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NORTH CAROLINA REPORTS.

VOL. 154.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

[V. 154]

FALL TERM, 1910

(IN PART).

SPRING TERM, 1911

(IN PART).

BY

ROBERT C. STRONG,

STATE REPORTER.

RALEIGH:
E. M. UZZELL & CO., STATE PRINTERS AND BINDERS.
1911.

~~AG~~
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2 Iredell Law	“	24	“
3 Iredell Law	“	25	“
4 Iredell Law	“	26	“
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11 Iredell Law	“	33	“
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA,

SPRING TERM, 1911.

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,	WILLIAM A. HOKE,
GEORGE H. BROWN, JR.,	[1]WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

T. W. BICKETT.

ASSISTANT ATTORNEY-GENERAL:

G. L. JONES.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

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[1] Elected to succeed JAMES S. MANNING.

108126

JUDGES

OF THE

SUPERIOR COURT OF NORTH CAROLINA.

Name.	*District.*	*County.*
George W. Ward	First	Pasquotank.
Robert B. Peebles	Second	Northampton.
Harry W. Whedbee	Third	Pitt.
Charles M. Cooke	Fourth	Franklin.
Oliver H. Allen	Fifth	Lenoir.
F. A. Daniels	Sixth	Wayne.
C. C. Lyon	Seventh	Bladen.
W. J. Adams	Eighth	Moore.
J. Crawford Biggs	Ninth	Durham.
Benjamin F. Long	Tenth	Iredell.
Henry P. Lane	Eleventh	Rockingham.
James L. Webb	Twelfth	Cleveland.
E. B. Cline	Thirteenth	Catawba.
M. H. Justice	Fourteenth	Rutherford.
Frank Carter	Fifteenth	Buncombe.
Garland S. Ferguson	Sixteenth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
J. C. B. Ehringhaus	First	Pasquotank.
John H. Kerr	Second	Warren.
Charles L. Abernethy	Third	Carteret.
Richard G. Allsbrook	Fourth	Edgecombe.
Henry E. Shaw	Fifth	Lenoir.
Herbert E. Norris	Sixth	Wake.
N. A. Sinclair	Seventh	Cumberland.
A. M. Stack	Eighth	Union.
S. M. Gattis	Ninth	Orange.
William C. Hammer	Tenth	Randolph.
S. P. Graves	Eleventh	Surry.
George W. Wilson	Twelfth	Gaston.
Frank A. Linney	Thirteenth	Watauga.
A. Hall Johnston	Fourteenth	McDowell.
Robert R. Reynolds	Fifteenth	Buncombe.
Felix E. Alley	Sixteenth	Jackson.

LICENSED ATTORNEYS, FEBRUARY TERM, 1911.

Thomas Walter Albertson	Guilford County.
Benjamin Leonidas Banks	Pasquotank County.
Allen Johnson Barwick	Wake County.
William Hugh Beckerdite	Forsyth County.
George David Bennett	Rockingham County.
Oscar Kimsey Bennett	Haywood County.
Edward Griffith Bond	Chowan County.
Paul Reese Capelle	Nash County.
Alwyn Williams Darden	Halifax County.
Louis Ludford Davenport	Edgecombe County.
Clyde Augustus Douglass	Wake County.
Claude Marshall Flowers	Durham County.
Paul David Grady	Johnston County.
Leonidas Herbin	Guilford County.
James Foy Justice	Henderson County.
Currin Greaves Keeble	Wake County.
Walter Samuel Lockhart	Orange County.
William Lunsford Long	Northampton County.
John Alexander McNorton	New Hanover County.
Richard Theodore Martin	Martin County.
Leroy Loyal Massey	Wake County.
Abner Clinton Payne	Alexander County.
Walter Hogue Powell	Columbus County.
John Green Prevette	Wilkes County.
George Moore Pritchard	South Carolina.
James Bascomb Smathers	Haywood County.
James Malcolm Sharp	Richmond County.
Clarence James Smith	Harnett County.
George Andrew Smith	Mecklenburg County.
Beverly William Stras, Jr.	Virginia.
Joseph Homer Stringfield	Pender County.
James McPherson Templeton	Wake County.
Alfred Jones Templeton	Wake County.
Robert Winfred Wall	Burke County.
Philip Williams	Virginia.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1911.

SUPREME COURT.

The Supreme Court of North Carolina meets in the City of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1911.
First District	August 29
Second District	September 5
Third District	September 12
Fourth District	September 19
Fifth District	September 26
Sixth District	October 3
Seventh District	October 10
Eighth District	October 17
Ninth District	October 24
Tenth District	October 31
Eleventh District	November 7
Twelfth District	November 14
Thirteenth District	November 21
Fourteenth District	November 28
Fifteenth District	December 5
Sixteenth District	December 12

SUPERIOR COURTS, FALL TERMS, 1911.

SPRING TERMS DATE FROM JANUARY 1 TO JUNE 30.
FALL TERMS DATE FROM JULY 1 TO DECEMBER 31.

The parenthesis numeral following the date of a term indicates the number of weeks during which court may hold.

NOTE.—Many changes in the times of holding the Superior Courts were made by the Legislature of 1911, and while pains have been taken to keep out inaccuracies, it may nevertheless be that some have crept into the Calendar, this volume going into print so soon after the laws for that session were printed.

FIRST JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Cline.*

Beaufort—‡Oct. 16 (2); †Nov. 27 (2); *Dec. 11 (1).
Currituck—‡Sept. 4 (1).
Camden—‡Sept. 11 (1).
Pasquotank—‡Sept. 18 (1).
Perquimans—‡Sept. 25 (1).
Chowan—‡Oct. 2 (1).
Gates—‡Oct. 9 (1).
Washington—‡Oct. 30 (1).
Dare—‡Nov. 14 (1).
Tyrrell—‡Nov. 7 (1).
Hyde—‡Nov. 20 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Justice.*

Northampton—‡July 31 (1); Oct. 20 (2).
Halifax—Aug. 21 (2); Nov. 27 (2).
Bertie—Sept. 11 (1); Nov. 13 (2).
Warren—Sept. 18 (2).
Hertford—Oct. 6 (2).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Carter.*

Pitt—*Aug. 21 (1); †Aug. 28 (1); †Sept. 18 (2); *Nov. 6 (1); †Nov. 13 (1); †Dec. 11 (1).
Greene—Sept. 4 (1); Dec. 4 (1).
Craven—*Oct. 2 (1); †Oct. 9 (1); †Nov. 20 (2).
Carteret—Oct. 16 (1).
Pamlico—Oct. 23 (1).
Jones—Oct. 30 (1).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Ferguson.*

Franklin—*Aug. 21 (1); †Oct. 16 (2).
Nash—*Aug. 28 (1); *Nov. 27 (1); †Dec. 4 (1).
Wilson—Sept. 4 (1); †Nov. 13 (2); *Dec. 18 (1).
Edgecombe—Sept. 11 (1); †Oct. 30 (2).
Martin—Sept. 18 (2); Dec. 11 (1).
Vance—Oct. 2 (2).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Ward.*

Duplin—*July 3 (1); †Aug. 28 (2); Nov. 20 (2).
Sampson—July 10 (1); †Aug. 7 (2); Oct. 23 (2).
Onslow—†July 17 (1); Oct. 16 (1).
Lenoir—*Aug. 21 (1); †Nov. 6 (2); *Dec. 11 (1).
Pender—Sept. 11 (2).
New Hanover—July 24 (2); Sept. 25 (1); †Oct. 2 (2); †Dec. 4 (1).

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Peebles.*

Wake—July 10 (2); Sept. 25 (2); †Oct. 23 (3).
Wayne—Aug. 21 (2); †Oct. 9 (2); Nov. 27 (2).
Harnett—Sept. 4 (1); †Nov. 13 (2).
Johnston—Sept. 11 (2); Dec. 11 (2).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Whedbee.*

Robeson—*July 3 (1); July 10 (1); *Sept. 11 (1); †Oct. 2 (2); *Nov. 6 (1); Nov. 6 (2); †Dec. 4 (2).
Columbus—†July 17 (2); Sept. 4 (1); ‡Oct. 23 (2); Nov. 27 (1).
Bladen—‡July 31 (1); *Oct. 16 (1).
Brunswick—†Aug. 7 (1); Sept. 25 (1); Oct. 2 (1).
Cumberland—*Aug. 28 (1); †Oct. 23 (2); *Nov. 20 (1).

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Cooke.*

Lee—July 17 (2); Nov. 20 (1).
Union—*July 31 (1); †Aug. 21 (2); Nov. 30 (2).
Chatham—Aug. 7 (1); Nov. 13 (1).
Moore—*Aug. 14 (1); †Sept. 18 (1); Dec. 11 (1).
Richmond—Sept. 4 (1); †Sept. 25 (1); ‡Oct. 30 (1); Dec. 4 (1).
Anson—*Sept. 11 (1); †Oct. 2 (2).
Scotland—*Oct. 16 (2); Nov. 27 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Allen.*

Granville—July 31 (1); Nov. 20 (2).
Person—Aug. 7 (1); Nov. 13 (1).
Guilford—Aug. 14 (2); *Sept. 18 (1); †Oct. 23 (2); *Dec. 11 (1).
Durham—*Aug. 28 (1); †Oct. 2 (2); *Dec. 4 (1).
Alamance—*Sept. 4 (1); †Sept. 11 (1); *Nov. 6 (1).
Orange—Oct. 16 (1).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Daniels.*

Montgomery—*July 3 (1); †Sept. 18 (2).
Stanly—*July 10 (1); †Sept. 11 (1).
Randolph—July 17 (2); Dec. 4 (2).
Iredell—July 31 (2); Oct. 30 (2).
Davidson—Aug. 14 (2); ‡Nov. 13 (1).
Rowan—Aug. 28 (2); Nov. 20 (2).
Davie—Oct. 2 (2).
Yadkin—Oct. 16 (2).

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*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Lyon.*

Ashe—July 10 (2); Oct. 23 (2).
Forsyth—*July 24 (1); †Sept. 11 (2); *Oct. 9 (1); †Dec. 4 (2).
Rockingham—*July 31 (1); Nov. 6 (2).
Alleghany—Aug. 21 (1).
Surry—†Aug. 28 (2); Nov. 20 (2).
Stokes—*Sept. 25 (1); †Oct. 2 (1).

TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge W. J. Adams.*

Mecklenburg—†July 17 (2); *Aug. 17 (2); *Sept. 25 (1); †Oct. 2 (3); †Nov. 27 (1); *Dec. 4 (1).
Cleveland—July 31 (2); Nov. 6 (2).
Cabarrus—Aug. 28 (1); Oct. 23 (2).
Lincoln—Sept. 4 (1); Dec. 11 (1).
Gaston—Sept. 11 (2); Nov. 20 (1).

THIRTEENTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Biggs.*

Wilkes—‡Aug. 7 (2); †Oct. 8 (2).
Catawba—‡July 10 (2); ‡Oct. 30 (2).
Alexander—‡Sept. 18 (2).
Caldwell—‡Aug. 21 (2); †Nov. 27 (2).
Mitchell—†July 24 (2); ‡Nov. 13 (2).
Watauga—‡Sept. 4 (2).
Avery—‡Oct. 16 (2).

FOURTEENTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Long.*

McDowell—July 24 (2); Sept. 18 (2).
Burke—Aug. 7 (2); †Dec. 4 (2).
Rutherford—†Aug. 21 (2); Oct. 30 (2).
Yancey—Sept. 4 (2).
Henderson—Oct. 2 (2); †Nov. 13 (2).
Polk—Oct. 16 (2).

FIFTEENTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Lane.*

Buncombe—†July 24 (3); ‡Aug. 14 (2); †Sept. 25 (3); ‡Oct. 23 (2); †Nov. 13 (4).
Madison—‡Sept. 11 (2); †Oct. 16 (1).
Transylvania—Aug. 28 (2); Nov. 6 (1).

SIXTEENTH JUDICIAL DISTRICT.

FALL TERM, 1911—*Judge Webb.*

Haywood—July 10 (2); Sept. 25 (2).
Swain—July 24 (2); Oct. 23 (2).
Cherokee—Aug. 7 (2); Nov. 6 (2).
Graham—Sept. 4 (2).
Clay—Sept. 18 (1).
Jackson—Oct. 7 (2).
Macon—Aug. 21 (2); Nov. 20 (2).

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*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

JETER C. PRITCHARD, Judge, Asheville, N. C.

DISTRICT COURTS.

Eastern District—HENRY G. CONNOR, Judge, Wilson.
Western District—JAMES E. BOYD, Judge, Greensboro.

EASTERN DISTRICT.

Terms.—Circuit and District terms are held at the same time and place as follows:

Raleigh, fourth Monday after the fourth Monday in April and October. H. L. GRANT, Clerk; GEORGE L. TONNOFFSKI, Deputy Clerk.
Wilmington, second Monday after the fourth Monday in April and October. SAMUEL P. COLLIER, Clerk.
New Bern, fourth Monday in April and October. GEORGE GREEN, Clerk.
Elizabeth City, second Monday in April and October. HENRY GREENLEAF, Clerk.
Washington, third Monday in April and October. ARTHUR MAYO, Clerk; GEORGE L. TONNOFFSKI, Deputy Clerk.

OFFICERS.

H. F. SEAWELL, United States District Attorney, Carthage, N. C.

I. M. MEEKINS, Assistant United States District Attorney, Elizabeth City.

CLAUDIUS DOCKERY, United States Marshal, Raleigh.

H. L. GRANT, Clerk United States District and Circuit Courts at Raleigh for the Eastern District of North Carolina, Goldsboro.

GEORGE L. TONNOFFSKI, Deputy Clerk.

SAMUEL P. COLLIER, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Wilmington.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at the same time and place, as follows:

Greensboro, first Monday in April and October. J. M. MILLIKEN, Clerk.
Statesville, third Monday in April and October. H. C. COWLES, Clerk.
Asheville, First Monday in May and November. W. S. HYAMS, Clerk.
Charlotte, second Monday in June and December. H. C. COWLES, Clerk.

(Terms of Court for Wilkesboro and Salisbury not put down as yet in the official record of the Department of Justice.)

OFFICERS.

A. E. HOLTON, United States District Attorney, Winston.
A. L. COBLE, Assistant United States District Attorney, Statesville.
WILLIAM E. LOGAN, United States Marshal, Greensboro.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

FALL TERM, 1910.

D. A. GARRISON v. THE VERMONT MILLS.

(Filed 14 December, 1910.)

1. **Equitable Liens—Contracts—Possession, Factor's—Liens at Law.**
Equitable liens arise either from written contracts, which show an intention to charge some particular property with a debt or obligation, or are declared by a court of equity from the facts and circumstances of the case, and do not depend upon possession, as do factors' liens and other liens at law.

2. **Equitable Liens—Form—Equity—Priorities.**
No especial form or phraseology is necessary to create an equitable lien, and a court of equity will look through the form to the substance; and when it appears that the parties intended to charge or pledge property as security to the debt, and the property can be identified, the lien follows, and the court will enforce it against all except those having a superior claim.

3. **Equitable Liens—Acts of Possession—Consent—Creditors—Registration—Principal and Agent.**
The factor and defendant manufacturing company contracted that the former would advance to the latter three-fourths of the net cash value of the manufactured goods on hand and stored with it, being the value thereof after deducting freights, commis-

sions, etc., the goods to be billed up to the factor and stored in separate warehouses according to the factor's custom, and insured in his favor. A receiver was appointed for the defendant, but prior thereto, under the arrangement stated, the defendant became indebted to the factor, and the agent of the latter visited defendant's mills in company with its president and other officers, took an inventory of the manufactured goods stored in the basement and warehouse, numbered by bales, pieces, and yards, stated that he took possession for his principal, the factor, and left it in charge of C., as the latter's agent: *Held*, (1) independently of the law regulating factors' liens, this constituted an assertion of control, and a taking of possession, reducing the pledge to the possession of the pledgee before the rights of the creditors under the receivership attached; (2) the undisputed evidence showing that C. had previously left the employment of the defendant, his possession was that of the pledgee; (3) therefore, to enforce the equitable lien against creditors, registration was unnecessary; (4) the factor having the right of possession under the contract, the assent of defendant's officers to his taking possession was unnecessary.

REHEARING of decision reported in 152 N. C., 644.

Appeal by the Cone Export and Commission Company, interpleaders, claiming the fund in hands of the receiver.

The facts found by the referee are substantially as follows: On 15 March, 1906, the Cone Export and Commission Company and the Vermont Mills, Incorporated, entered into a written contract that the Cone Export and Commission Company was to have the exclusive sale of the entire product of the defendant's mills at Bessemer City, N. C., except such goods as it might sell to its own store for sale to its customers. It is further provided in said contract:

"Fourth. The party of the second part, the Cone Company, will advance to the party of the first part, the Vermont Mills, upon their demand, three-quarters of the net cash value of goods on hand stored with the party of the first part. By net cash value is meant the net proceeds after deducting freights, cash, and other discounts, commissions, etc. The goods thus advanced on are to be billed up by the party of the first part to the party of the second part, and are to be stored and put in separate warehouses, as is the present custom of the party of the first part with their present commission house, and insured for the account of the party of the second part by the party of the first part."

This contract was in force when the receiver was appointed for the mills, and under it the interpleader had advanced the company over $13,000 on the output of the mills to be shipped to it.

The following is taken from the report of the referee:

6. On 15 January, 1907, prior to the appointment of the receiver, one W. B. Vaught, agent of the claimant, visited the mills in company with D. A. Garrison, president of the mills; R. F. Coble, a director and superintendent of the mills; J. H. Wilkins and S. J. Durham, and took an inventory of the cloth already made by the mills; that said cloth was on the looms, some stored in the basement, and some in the warehouse; there was only one warehouse; that said Vaught stated that he took possession of the cloth as the property of said claimant, and appointed said Coble as agent of claimant, to care for and hold said cloth; that these acts and declarations were not assented to by D. A. Garrison, president, for himself or on behalf of the mills; that the cloth was numbered by bales, pieces, and yards; that said cloth remained in its then position until taken charge of by the receiver.

7. That on 15 January, and at the date of the appointment of the receiver, said mills were indebted to claimant, and the claimant held invoices for the goods which were then on the premises of the mills, and said indebtedness was in the nature of advances thereon.

8. That on 26 February, 1907, the receiver and claimant entered into a contract whereby claimant was to dispose of the cloth on hand at the mills at the date of the appointment of receiver, and to account for same, awaiting the legal determination of the ownership thereof.

9. That the net proceeds derived by claimant from sale of said cloth on hand at mills at the date of the appointment of receiver under the contract between receiver and claimant amounted to $4,579.33.

10. That the net proceeds derived by claimant from the sale of cloth in its possession in New York, prior to the appointment of receiver, amounted to $3,337.39.

11. That at the date of the appointment of receiver the mills were indebted to claimant in the sum of $13,387.92.

King & Kimball and James H. Pou for petitioner, Cone Export Company.

Burwell & Cansler and O. F. Mason for receiver, appellee.

BROWN, J. When this case was determined at the first hearing I fully concurred in the opinion of the Court, that "The Cone Export and Commission Company acquired no lien by virtue of its contract of 15 March, 1906, for that was purely an executory contract that goods should be shipped to said company for sale on commission."

I thought then that it was necessary that the interpleader establish a "factor's lien" for its advances, and that to do so the factor must show actual possession.

A factor's lien arises by operation of the common law, for it is universally recognized that a factor, or commission merchant, without any written or verbal agreement, by the law merchant, has a lien upon the goods consigned to him, *while in his possession*, for all advances made to the consignor. It is purely a possessory lien, and I was of opinion that the manner and circumstances under which the interpleader claimed to have taken possession through its agent Vaught did not give it a factor's lien for advances theretofore made. Subsequent reflection and investigation have convinced me that it was not necessary that the interpleader should assert a factor's lien, for under the fourth section of the contract it had an equitable lien upon the goods which a court of equity will enforce.

While it would appear from the findings that Vaught asserted dominion over the goods and undertook to take possession of them in the name of his principal, yet such actual possession was not necessary to the validity of the interpleader's lien.

Equitable liens do not depend upon possession as do factors' liens and other liens at law. They arise either from a written contract, which shows an intention to charge some particular property with a debt or obligation, or are declared by a court of equity from the facts and circumstances of a case.

Where there is an intention coupled with a power to create a charge on property, equity will enforce such charge against all except those having a superior claim. Such liens are "simply a right of a special nature over the thing, which constitute a charge or encumbrance upon the thing itself, may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case or its rents and profits in the other applied upon the demand of the creditor in whose favor the lien exists. It is the very essence of this condition that while the lien continues the possession of the thing remains with the debtor." 3 Pomeroy Eq. (1 Ed.), sec. 1233. An interesting and learned discussion of the subject is to be found in *Ketchem v. St. Louis,* 101 U. S., 306, where the authorities are collected.

Mr. Loveland in his work on Bankruptcy, p. 600, says: "Liens may be divided into three classes: First, common-law or retaining liens; second, liens created by statute, such as mechanics' liens; third, equitable liens. The term lien is specially applicable to the common-law lien; but it is by analogy generally applied to other cases, where a right to prepayment exists out of a particular property or a particular asset or interest in property, either by contract, expressed or implied, or by the implication of a trust or statute, although the property itself may be in the possession of or vested in the person claiming the lien. Liens of this description are in the nature of equitable charges."

Equitable liens do not depend upon possession, nor, strictly speaking, do they constitute a *jus in re* or a *jus ad rem,* but more properly constitute a charge upon the thing, which can be enforced only in equity jurisdictions. 2 Story's Eq. Juris., sec. 1213; *Peck v. Jenness,* 7 How., 812; *The Menominie,* 36 Fed., 197; *Hydraulic Co. v. Wilson,* 33 N. E., 133.

This principle is recognized in our own Reports in *Arnold v. Porter,* 122 N. C., 242: "Equitable liens do not depend upon possession, as do liens at law. Possession by the creditor is not essential to his acquiring and enforcing a lien, but the other incidents of lien at common law must exist to constitute an equity lien. In courts of law the term 'lien' is used as synonymous with a charge or encumbrance upon a thing where there is neither *jus in re* nor *ad rem* nor possession of the thing. The term is applied as well to charges arising by express engagement of the owner of the property, and to a duty or intention implied on his part to make the property answerable for a specific duty or engagement."

1 Jones on Liens, sec. 27, says: "An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of the general considerations of right and justice, as applied to the relations of the parties and the circumstances of their dealings."

Mr. Bispham, in his work on Equity, sec. 351, gives substantial reasons for extending the doctrine of equitable liens in mercantile transactions: "Besides the common-law liens, there are certain liens, or rights in the nature of liens, which are wholly independent of possession, which exist only in equity, and of which equity alone can take cognizance. In modern times the doctrine of equitable liens has been liberally extended for the purpose of facilitating mercantile transactions, and in order that the intention of parties to create specific charges may be justly and effectually carried out." No especial form or phraseology is necessary to create this lien. A court of equity will look through the form to the substance, and when it appears that the parties intended to charge or pledge property as security for a debt, and the property can be identified, the lien follows, and the court will enforce it.

As said by *Justice Story* in *Flagg v. Mann,* Federal Cases, No. 4847, "If the transaction resolves itself into a security, whatever may be its form and whatever name the parties may choose to give it, it is in equity a mortgage."

When we turn to the judgments of the English chancellors we find the doctrine of the enforcement of equitable liens upon property in the possession of the debtor fully recognized, broadly construed, and invariably enforced.

In *Legard v. Hodges,* 1 Ves., Jr., 478, *Lord Thurlow* said: "I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any one claiming under him voluntarily, or with notice, raises a trust." In the report of that case in 3 Bro. C. C., 531, the *Lord Chancellor* says: "I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement."

Other English cases supporting the contentions of the interpleader are: *In re Music Hall Co.,* 3 D. E. G., J. and S., 147; *Watson v. Duke of Wellington,* 1 Russ. and Myl., 602; *Yeates v. Groves,* 1 Ves., Jr., 279.

We find upon examining the reports of the courts of this country a great variety of cases where equitable liens have been enforced upon property in possession of the debtor, many of them under circumstances where the intention of the parties to charge the property was not so clearly manifested as in this case. *Martin v. Schichtl,* 60 Ark., 595; *Ward v. Stark,* 121 S. W., 382; *Pinch v. Anthony,* 8 Allen (Mass.), 536; *Bell v. Pelt,* 51 Ark., 433; *Daggett v. Rankin,* 31 Cal., 327; *Wayt v. Carwithen,* 21 W. Va., 520; *Knott v. Mfg. Co.,* 30 W. Va., 795; *Person v. Obertenffer,* 59 How. Pr., 339; *Hovey v. Elliott,* 118 N. Y., 124; *Wilde v. Watts,* 138 Fed., 432; *Fidelity Ins. Co. v. Ry. Co.,* 11 S. E., 58; *Goodnough v. Galloway,* 156 Fed., 510; *Feeley v. Bryan,* 47 S. E., 307; *Reardon v. Higgins,* 79 N. E., 210; *Burdon Central Sugar Co. v. Ferris Sugar Co.,* 78 Fed., 417; *Donald v. Hewitt,* 33 Ala., 534; *Kilbourn v. Wiley,* 83 N. W., 99.

An instructive case is *Hurley v. R. R.,* 213 U. S., 126, on all-fours with the case at bar, in which the Supreme Court of the United States held in 1908 that "an advance payment for coal yet to be mined may be a pledge on the coal, and in that event, as in this case, the trustee in bankruptcy takes the mine subject to the obligation to deliver the coal as mined to the extent of the advancement." In delivering the opinion of the Court, *Mr. Justice Brewer* says: "Equity looks at the substance and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day, as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered, and is, from an equitable standpoint, to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature remained undisturbed thereby. If there had been no bankruptcy proceedings, the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement."

In *Hanselt v. Harrison*, 105 U. S., the creditor had advanced money for the purpose of purchasing skins to be tanned and finished. The creditor claimed and was given an equitable lien by reason of making the advances under the agreement. The discussion by *Mr. Justice Matthews* is quite applicable to the case at bar, as is also the opinion of the Court by *Mr. Justice White* in *Walker v. Brown*, 165 U. S., 654; *Burden Sugar Ref. Co. v. Payne*, 167 U. S., 127; *Carr v. Hamilton*, 129 U. S., 252; *Bank v. Yardley*, 165 U. S., 634.

While I have discussed the doctrine of equitable liens, equitable rights, and equitable mortgages, and have used those terms, it is for the purpose of showing how equity will look at the substance of any transaction and compel the appropriation of property in accordance with the agreement of parties. I do not wish to be understood, however, as conceding that the contract in this case creates technically a mortgage, or a conditional sale within the purview of our registration laws. In my opinion, the contract is in the nature of an equitable assignment and appropriation of the property to the payment of the advances.

It comes within the principle clearly expressed by *Mr. Justice Hoke* in *Godwin v. Bank*, 145 N. C., 330, in these words: "This case presents no executory agreement to make a pledge of personal property as security for a past indebtedness, nor is it an executory agreement to give a chattel mortgage or other lien which requires registration either by State law or the Bankruptcy Act. But, as we have endeavored to show, it is a present equitable assignment for a cash consideration of the bonds, etc."

I concur in the conclusion reached by *Mr. Justice Manning* in his dissenting opinion in this case, 152 N. C., 648, that the principle settled in *Brem v. Lockhart,* 93 N. C., 191, has no application here, as in that case the contract in writing was conceded to constitute a conditional sale requiring registration.

Conceding for sake of argument, however, that the contract under consideration partakes of the nature of a mortgage, a lien, or pledge, the findings show that the interpleader took actual possession and asserted its claim on 14 and 15 January, 1907, some two weeks before creditors sought to subject the property and had a receiver appointed or any rights attached.

Where property is pledged the delivery need not be made contemporaneously with the pledge, and if made thereafter it relates back to the date when the contract or pledge was made. *Chem. Co. v. McNair,* 139 N. C., 326; *Tomlinson v. Bank,* 145 Fed., 824; *Mills v. Virginia Co.,* 164 Fed., 168.

Coble in his testimony states that Vaught assumed control of the goods and turned them over to him, and that thereafter he maintained control, and that he thereafter assembled the goods, which were theretofore some in the different parts of the mill and the greater part in the warehouse. This is in accordance with the findings of the referee. This constitutes an assertion of control and a taking possession and reduced the pledge to the possession of the pledgee before the rights of creditors attached.

The Supreme Court of Massachusetts holds that goods in process of manufacture, but left in the warehouse of the manufacturer, and nominally placed in the custody of one of his employees as agent for pledgee, sufficient. *Sumner v. Hamlet,* 29 Mass., 76.

While there is no finding in respect to Coble's status, the undisputed evidence shows that he had been recently an employee of the Vermont Mills, but was not at the time in its employ, but had been employed by Cone to take charge of the Southern Cotton Mills.

The fact that Garrison, the president of the corporation, was present and did not affirmatively give his assent, is immaterial.

The right to take possession upon the part of the interpleader being established, it had a right to assert it even against Garrison's protest, much less his mere silence.

That the defendant corporation had appropriated and dedicated all these goods to the payment of the advances is manifest from section 4 of the contract. The money was not advanced upon the credit of the corporation, but practically in partial payment for the goods, which were to be insured in the interpleader's name. They were to be marked and billed to it and stored as its property, and the invoices for the goods had been sent to interpleader before Vaught arrived at the mills. Equity considers these things as done. Under such conditions, the right of the receiver is no greater than that of the insolvent corporation. *Thompson v. Fairbanks,* 196 U. S., 516; 1 Pom. Eq., sec. 155; *Godwin v. Bank, supra.*

In conclusion, I will state that I assume my full share of responsibility for the former decision in this case, and I am glad to have the opportunity to aid in correcting the error which, I am now convinced, was made.

For the reasons given, the Court is of opinion and adjudges that the interpleader, the Cone Export and Commission Company, is entitled under the terms of the contract to the $4,579.33 in its possession as the proceeds of sale of the goods; the same to be credited upon its debt of $13,387.92 against the Vermont Mills allowed in paragraph 4 of the decree.

That part of the decree of the Superior Court embraced in paragraph 3, which adjudges "that the claimant account for and pay over to the receiver the sum of $4,579.33," is reversed.

The receiver will be taxed with all the costs of this Court.

Petition to rehear allowed.

D. J. McDONALD v. MacARTHUR BROS. COMPANY.

(Filed 14 December, 1910.)

Appeal and Error—Courts—Expression of Opinion—Interpretation of Statutes.

In this case the judge in charging the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff bases the eleven thousand and some odd dollars": *Held*, this was not an expression of opinion prohibited by Revisal, 535, it not appearing that the expressions used were pertinent to the issue, or were prejudicial to appellant, or corroborative of an alleged error based upon his admitted ignorance, or failure to comprehend plaintiff's claim, upon which the law was incorrectly charged.

Walker, J., dissenting.

Appeal by plaintiff from *G. W. Ward, J.*, at the May Special Term, 1910, of McDowell.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

McCormick, Henson & Brown, Pless & Winborne for plaintiff.
Hudgins, Watson & Johnson, Justice & Broadhurst for defendant.

Clark, C. J. The plaintiff rests his appeal upon one exception. In charging the jury his Honor used this language: "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff bases the eleven thousand and some odd dollars." The plaintiff contends that this is an expression of opinion by the judge upon the facts, which was forbidden by the act of 1796, ch. 452, now Rev., 535. That statute provides: "No judge in giving a charge to the petty jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury."

The remark of his Honor was an expression of diffidence, and so far from intimating an opinion to the jury that any fact was or was not proven, it meant that he did not know whether it had been proven or not. If the plaintiff had ground to allege that the judge had not charged the law correctly, this remark might be some corroboration of the alleged error based upon the judge's admitted ignorance, or failure to comprehend the plaintiff's claim. But it is certainly not an expression by the judge that any fact or facts had or had not been fully proven.

The plaintiff particularly relies upon *Powell v. R. R.,* 68 N. C., 395. In that case the judge said: "We have not been informed that the inspector was competent, etc." The Court on appeal justly observed that when a judge tells a jury, "We are not informed" of a fact upon which the jury must pass, "he can only mean that there is no evidence of that fact." That case is certainly not in point here. The judge does not say that he is not informed, that there is no evidence, but merely expresses a doubt whether he himself fully comprehends it. If his charge showed that he did not fully comprehend it and made an error of law in his instructions to the jury, against the plaintiff, in consequence, such error would be ground for exception; but the plaintiff made no such exception.

The prohibition in our statute against the judge's expressing an opinion upon the facts, in his charge to the jury, did not exist at common law, nor does it obtain in England or in the Federal Court, and indeed has been enacted in very few of the States of this Union. In this State, we have always held that the prohibition applies only to an expression of an opinion as to those facts which are pertinent to the issues to be decided by the jury, and the appellant must show that the remark was prejudicial to him. It does not appear here that the remark of the judge was an expression of an opinion whether any facts were or were not proven, nor that the remark was prejudicial. It is very usual for the judge in reciting the testimony to tell the jury that, notwithstanding his recital, the jury must take their own recollection of the evidence. His Honor evidently meant something of that kind here. Certainly, his expression of diffidence and modesty should not be counted unto him for bias or unrighteousness.

No error.

WALKER, J., dissenting.

DAVID A. THOMPSON ET AL. *v.* GREEN RIVER POWER COMPANY.

(Filed 14 December, 1910.)

1. **Deeds and Conveyances—Trusts—Principal and Agent—Limitation of Powers.**

For the management and sale of their lands the plaintiffs made a trust deed, which provided for a local and superintending agent, and that no deed made by the trustees would be of any validity or effect unless the same be approved by the superintending agent, who was fully empowered by the writing for that purpose. By various and successive written powers of appointment under the original deed in trust and made in pursuance thereof and referring thereto, several local agents were appointed in succession to each other, expressly stating the condition of approval by the superintending agent to the validity of a sale: *Held*, the requirement of the indorsement of the superintending agent to give validity to the exercise of the power of sale by the trustees is a valid limitation upon their power, and necessary to the validity of their deed.

2. **Same—Equity—Contracts to Convey—Specific Performance.**

When in a deed to lands made to a trustee there is a valid condition expressed that a sale would not be valid when made by a local agent unless approved in writing by a superintending agent, definitely limiting the powers of the local agent and trustee, and this condition has not been complied with in a contract to convey given to defendant, in the plaintiff's suit to remove a cloud on his title to the *locus in quo*: *Held*, in this case, a deed subsequently tendered to and refused by the defendant, with the required approval of the superintending agent, who was ignorant of the refusal until just before the commencement of the suit, did not vest the equitable title in the defendant and give him the right to specific performance of the contract to convey.

3. **Principal and Agent—Deeds and Conveyances—Limited Power—Conflict of Authority.**

In this case the limited power of attorney given the local agent does not conflict with a condition that a designated superintending agent should approve the conveyance to be made by the trustees designated in a deed of trust incorporating a general scheme by the grantors for the sale and management of their lands.

4. **Deeds and Conveyances—Principal and Agent—Limited Powers—Registration—Notice—Parol Evidence.**

Purchasers are put upon notice of the limited powers of sales agents for lands, which were contained and defined in a registered deed of trust incorporating a general scheme for the sale of grantor's lands for them, and the law requiring that the acts of such agent must be in writing, the scope of the agent's authority cannot be extended by a subsequent oral agreement.

5. **Same—Ratification—Contracts to Convey—Specific Performance Equity.**

The grantors in a deed of trust of lands to be conveyed by the trustee for their benefit under a general and defined scheme of sale, imposing a condition that the sale should be assented to in a particular way by an agency defined in the deed for the purpose, are not held to the ratification of the unauthorized acts of sale made without the performance of the condition imposed, by the receipt of the purchase price by the trustees, in the absence of knowledge or notice thereof; and equity will remove the cloud from the title of the *cestuis que trust* upon their paying back the purchase money with interest from the date of payment.

APPEAL from *Councill, J.*, at the May Term, 1910, of HENDERSON.

This action was brought under section 1589, Revisal, to remove a cloud from the title of plaintiff, asserted by defendants. The defendants, admitting the legal title to be in the plaintiffs, assert that they have the equitable title under a contract to convey made by the attorney in fact of the plaintiffs, to wit, one S. B. Justice, said contract being dated 27 March, 1900, and that on 2 April, 1900, they paid the full purchase price, $100, for the land. It was admitted that a deed dated 12 October, 1905, was tendered defendant Staton, with whom the written contract of purchase was made, but it was rejected by Staton, as the description of the land did not agree with the description in his contract. The original contract contained no sufficient description of the land to admit of its identification, but defendants Staton and his assignees contend that, at the time the contract was delivered, a plat of the land was delivered as a part thereof, signed by the agent and containing a sufficient description. It also appears that the original contract was recorded without including the description from the plat, which is not therein referred to, and about two years thereafter the agent of plaintiffs inserted in the original contract the full description, which was not thereafter recorded upon proof, but the full description was written therein on the record after this suit was brought. The defendants contend that the payment of the purchase money to plaintiff's local agent, the payment of it to the plaintiffs by their agent, and its retention of it by them for about nine years, estops them to now repudiate the contract and refuse to make the deed; that the refusal to make the deed is wrongful; that after the payment of the purchase money, Staton went into possession and remained therein for about seven years and until he sold to the other defendants. The defendant, Green River Power Company, a corporation, claims that it is the owner of the equitable title of Staton and is entitled to have deed conveying the legal title made to it.

The following issues were submitted to the jury, who responded thereto as is set out:

1. Did the predecessors in trust of plaintiff trustees, through their agent, C. B. Justice, and U. G. Staton, one of the defendants, enter into a written contract dated 27 March, 1900, marked "Exhibit A," for the sale and purchase of 55 acres of land, as alleged in the answer? Answer: Yes.

2. Did the said agent of the predecessors in trust of plaintiff trustees, at the time of entering into said contract dated 27 March, 1900, deliver to defendant U. G. Staton a survey and plat of said 55 acres of land, known as the G. B. Heatherly survey, and place said defendant Staton in possession of said land under said contract and survey, as alleged in the answer? Answer: Yes.

3. Have the defendants been in actual, continuous possession of said 55 acres of land under and by color of said contract dated 27 March, 1900, as per calls of said Heatherly survey, and after payment of the purchase price, for more than seven years prior to the commencement of this action? Answer: Yes.

4. Did the defendant U. G. Staton pay to the agent of the predecessors in trust of plaintiff trustees, on 2 April, 1900, the full purchase price for said 55 acres of land, in accordance with

the terms of said contract dated 27 March, 1900, and did said agent turn over the money so received to the predecessors in trust, as alleged? Answer: Yes.

5. Have the plaintiff trustees, and their predecessors in trust, retained the purchase price for said 55 acres of land from 2 April, 1900, until about 1 May, 1909, without advising the defendants that they repudiated said contract or refused to execute a deed in accordance therewith, as alleged in the answer? Answer: Yes.

6. Has C. B. Justice, under power of attorney, as recorded in Book 61, page 224, of the records of Henderson County, N. C., acted continuously under said power to date of his death, about 1 January, 1910, as the agent of plaintiff trustees and their predecessors in trust, as alleged in the answer? Answer: Yes.

7. Are the plaintiff trustees and Willett Bronson wrongfully and unlawfully refusing to execute a deed to defendants for the land, in accordance with the said contract dated 27 March, 1900, as alleged in the answer? Answer: Yes.

8. Did defendant U. G. Staton, for value, assign his interest in said contract dated 27 March, 1900, to the defendant J. M. Torrence, as alleged in the answer? Answer: Yes.

9. Did the defendant J. M. Torrence, for value, assign his interest in said contract dated 27 March, 1900, to the defendant, the Green River Power Company, as alleged in the answer? Answer: Yes.

Thereupon his Honor rendered judgment for the defendants, decreeing that they were entitled to specific performance of the contract, and if deed sufficient to pass the fee were not made within a fixed time, the decree should operate as a conveyance, and for costs. The plaintiffs appealed.

Smith & Schenck and J. H. Merrimon for plaintiffs.
Maxwell & Keerans, H. G. Ewart, and Staton & Rector for defendants.

MANNING, J. The decision of this case and the determination of the rights of the parties depend upon the proper construction of certain deeds of record in the county in which the land involved is situate, and which were offered in evidence at the trial.

On 8 March, 1830, Isaac Bronson and Goold Hoyt, of the city of New York, then being owners of large bodies of land (locally known, it seems, as speculation lands) in Mecklenburg, Rutherford (and in that area now Henderson), and Buncombe counties, in this State, conveyed the same to James Hoyt, John N. Ward, and William G. Ward, as trustees. The trusts upon which they were to hold said lands are drawn and declared with great care and particularity. The grantors therein defined a scheme for the management and disposal of said lands which involved the appointment of a special or local agent to make leases and contracts of sale, and a superintending agent, whose approval and indorsement was indispensable to the validity of any conveyance by the trustees. On this point this deed provided: "But no deed, lease, or conveyance whatsoever of the premises or any part thereof shall, if made by said parties of the second part (the trustees), or any one of them, be of any validity or effect whatsoever unless the same be approved and indorsed by Arthur Bronson, esquire, who hath been duly empowered for that purpose." Joshua Forman was named as the local agent, and the instrument by which he was appointed and his powers limited is therein expressly referred to. The deed also contained carefully drawn directions as to the method of appointment of the successor trustees, superintending agent, and local agent; and these several deeds successively made contained the same requirement as to the indorsement and approval of the superintending agent to give validity to deeds or conveyances by the trustees. Frederick Bronson succeeded Arthur Bronson as superintending agent, and was in turn succeeded in 1869 by Willett Bronson, who has been since then and is now the superintending agent. T. B. Justice succeeded Joshua Forman as local agent, and was in turn succeeded, 1 November, 1872, by C. Baylis Justice. All these appointments were made in the manner prescribed by the original deed of 1830. In 1859 and again in 1871 and in 1901, new trustees were appointed in the prescribed manner, and these later deeds refer expressly to the previous deeds by dates and books of record.

The deed of 1871, one of the deeds in which new trustees are appointed, after reciting the previous deeds, contains the following provisions: "And the said parties of the second part (the trustees) or such of them as survive, shall at all times, at the proper cost and charges of the said heirs and assigns of the said Isaac Bronson, Goold Hoyt, and Archibald McIntyre (who had purchased an interest), make and execute such deeds, leases, and conveyances of the premises as shall be required or directed by said heirs . . . and especially when required by Thomas B. Justice, the special agent of the parties of the first part for managing, leasing, and selling the lands aforesaid, thereunto authorized by a special and limited authority . . . but no lease, deed, or conveyance of said premises or any part thereof shall, if made by the said parties of the second part or any of them, be of any validity or effect whatever, unless the same be approved by Willett Bronson, who hath been fully empowered for that purpose." And it further therein provided: "which deeds, leases, and conveyances, to be lawful, are to be indorsed and approved in manner aforesaid."

Thomas B. Justice having ceased to act as the local agent, C. Baylis Justice, as hereinbefore stated, was duly appointed on 1 November, 1872, by a written power of attorney, in which the deed of 1871, from which we have quoted, was expressly referred to. This power of attorney undoubtedly confers large powers upon the attorney in fact, but no larger than are expressly authorized by the deeds of trust, and in no provision of that instrument is the requirement of the approval by indorsement of the superintending agent dispensed with, nor could it be. The method and manner of his appointment, as prescribed in the deed of trust, is carefully followed, and the deed authorizing his appointment referred to. The precise questions presented, therefore, are:

(1) Is a conveyance or deed valid without the indorsed approval of the superintending agent?

(2) Can the local agent make a contract absolutely binding and enforcible against the trustees, under the provisions of these deeds?

The requirement of the approving indorsement of the superintending agent to give validity to the exercise of the power of sale by the trustees is clearly a limitation upon their power and clearly within the right of the creators of the trust to annex. In 2 Perry on Trusts, sec. 784 (5 Ed.), it is said: "If the sale is directed to be made with the consent of the tenant for life, or any other person, such consent is indispensable to a valid exercise of the powers." In Sugden on Powers, star page 319, this writer says: "Where the consent of any person is required to the execution of the power, that, like every other condition, must be strictly complied with." In 4 Kent's Commentaries, 330, the learned author says: "But it is the plain and settled rule that the conditions annexed to the exercise of the power must be strictly complied with, however unessential they might have been if no such precise directions had been given. They are incapable of admitting any equivalent or substitution; for the person who creates the power has the undoubted right to create what checks he pleases to impose, to guard against a tendency to abuse. The courts have been uniformly and severely exact on this point." And at p. 333 he further says: "In all other respects the intention of the grantor of a power, as to the mode, time, and conditions of its execution, must be observed, subject to the power of the court of chancery to supply defective executions. When the consent of a third person to the execution of a power is requisite, the consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon." So this Court held in *Haslin v. Kean*, 6 N. C., 309: "The main question in this case is whether John Haslin, by the deed which he executed to Kean, completely and in due form executed his power. If he did, there is an end to the wife's power; if he did not, she was entitled to appoint. The present controversy is between volunteers, and the wife is entitled, unless there has been not only an *intention* to appoint, but an *actual* appointment, and that made in the *precise* form required by the power." See, also, *Phifer v. Phifer*, 41 N. C., 155. So in *Pippen v. Wesson*, 74 N. C., 437, and *Hardy v. Holly*, 84 N. C., 661, it was held by this Court that, "One who contracts by virtue of a power, statutory or otherwise and who, except by such power, is incapable of contracting, must pursue the power, or such contract will be void."

Under these authorities we must, therefore, conclude that the approval of Wilbur Benson, the superintending agent, endorsed on the deed, was necessary to give it validity. Such a deed so indorsed by Benson, dated in 1881, was tendered the defendant Staton and rejected by him because, as he asserted, it did not embrace the boundaries covered by his contract with the local agent. It does not appear that Benson was informed of the rejection of this deed by Staton until shortly before this action was brought. (2) Could the local agent make a contract for the sale of land, binding and enforcible in equity against the owners, in the absence of the approval of Benson, the general superintending agent? The power of attorney under which the agent Justice acted, and from which he derived his authority, was in writing, was recorded in the county of Henderson, and was offered in evidence by the defendant. While the powers are extensive, the deed of 1877 is therein referred to, and that was also duly recorded. The powers given the agent Justice in no way conflict with the power and duty of Benson, and we do not think such power and duty could be destroyed or impaired by the power of attorney empowering Justice, the local agent.

In *Bank v. Hay*, 143 N. C., 326, this Court, speaking through *Justice Walker*, said: "There is a general rule that when one deals with an agent it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal. For under any other rule, it is said, every principal would be at the mercy of his agent, however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops, or how far his commission goes, before he closes the bargain with him. *Biggs v. Ins. Co.*, 88 N. C., 141; *Ferguson v. Mfg. Co.*, 118 N. C., 946; 1 Am. and Eng. Enc. of Law and Practice 983. At page 986 of the same work it is said: "Where a third person has knowledge that an agent's authority is in writing, or that it must necessarily be in writing in order to bind the principal, he must call for and examine the power and take notice of the nature and extent of the authority conferred, as any act beyond the scope of such written authority will ordinarily not be binding on the principal." "Where real estate is the subject of sale, the person purchasing of an agent must see that the power to convey is of equal dignity with the deed to be executed." *Peabody v. Hoard,* 46 Ill., 242.

The examination of the power of attorney to Justice would have informed the defendant Staton of the limitation of his power to bind these principals to execute a deed in pursuance of his contract, and would have led him to discover the requirement of the approval of the superintending agent Bronson. The principle controlling this is clearly stated in 2 Pom. Eq. Juris. (3 Ed.), sec. 626, and is uniformly accepted by the courts and text-writers: "Wherever a purchaser holds under a conveyance and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The reasons for this doctrine are obvious and most convincing; in fact, there could be no security in land ownership unless it were strictly enforced." *Smith v. Fuller,* 152 N. C., 7; *Johnson v. Prairie,* 91 N. C., 159; *Holmes v. Holmes,* 86 N. C., 205; *Thompson v. Blair,* 7 N. C., 583.

The defendants, however, contend that the consent of Bronson to the deed is withheld for improper and selfish purposes; but there is no evidence, we think, to support this contention, except that he stated at the trial that he would not consent to a deed covering the boundaries as demanded by the defendants, and assigned his reasons therefor, which in no view can be regarded as improper or selfish. The defendants Staton and Torrence were informed in 1901 or 1902 that no land interfering with water power of Green River would be sold or conveyed.

The defendants further contend that, as it had been the custom of Bronson to approve deeds conveying the lands contracted to be sold by Justice, and this custom had been extended over 40 years, they had a right to rely upon this uniform custom as an interpretation of the powers of Justice. But Bronson testified, and this was the only evidence upon this question, that no deed had been executed by the trustees without his written approval indorsed thereon. This was in strict compliance with the power created by the deed of trust. The power of attorney and the deed of trust leave no room for doubt as to the powers conferred. What was thought generally of the power of Justice, or what the defendants Staton and Torrence inferred were his powers from the conduct of Justice, is not competent to enlarge the express powers conferred upon him by his written appointment. In *Minnesota Stoneware Co. v. McCrossen,* 110 Wis., 316, 84 Am. St., 927, the Court said: "The idea is advanced that written authority to an agent may be extended by subsequent oral authority. That is so in many cases, but not where the authority is required to be in writing. A power to sell and convey real estate can no more be extended or changed by parol than can a conveyance of real estate. That is so elementary that the suggestion of respondent's counsel to the contrary does not require further notice."

It is further contended that there was such ratification of the contract by the receipt and retention of the purchase money, that the plaintiff ought to be compelled to specifically perform this contract. In *Earp v. Richardson,* 81 N. C., 5, this Court said: "When the agency is to be proved by the subsequent ratification and adoption of the act by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts. 2 Greenl. Ev., sec. 66." And this is the generally accepted doctrine. The contention of the defendants, as presented in this phase of the case, is that the acquiescence or ratification by the trustees of acts not performed in accordance with the terms of the trust deed creating their power to convey can substitute a different method of executing the power than that prescribed therein, and to this extent create a new method. This is contrary to the doctrine stated in the authorities we have already quoted from. No acquiescence or ratification by the *cestuis que trustent* is shown by the evidence, nor is there any evidence from which ratification or acquiescence by them can be inferred. As the dealings appeared to them, they were conducted in strict accordance with the terms of the deed, and this can also be said as to the trustees themselves. The evidence negatives, so far as the trustees and beneficiaries knew, any failure to observe the methods prescribed for executing the power. The evidence offered does not present the case of an attempt to repudiate a contract, but simply a case where the court will refuse to compel specific performance of a contract because it is not executed in accordance with the formality prescribed by the written instruments which control it.

The plaintiffs cannot, of course, retain the money, to wit, $100 paid by defendant Staton. They aver a tender of its return and express a willingness to repay it with interest from the date of payment, to wit, 2 April, 1900. This must be paid into court, and upon its payment into court, judgment will be entered canceling the contract as registered, and the subsequent deeds and assignments of the contract made by the defendants *inter se.*

Under the evidence and the law, his Honor should have directed a finding for the plaintiffs upon the 5th and 7th issues. The other issues are immaterial and do not present any controverted facts. For the errors pointed out, the judgment is

Reversed.

R. T. WEST ET AL. v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 14 December, 1910.)

Railroads—Damages—Release—Mental Incapacity—Evidence—Conductor—Nonsuit.

In this case, reported 151 N. C., 231, it was held necessary, to set aside plaintiff's release for damages for personal injuries sought in his action, for plaintiff to prove that defendant had notice of his mental incapacity at the time. The evidence on this appeal, in addition to that on the former appeal, tends to show that certain letters indicating his mental soundness, though signed by plaintiff, were written with the aid of his wife and others in view of having him continued in his occupation as defendant's conductor, but this fact was withheld from defendant; there was also evidence tending to show that defendant knew of plaintiff's nervous condition, rendering him incapable of running as conductor, eight months before he signed the release. The amount paid for plaintiff's release was about 94 per cent of the amount of his original demand for damages: *Held*, insufficient to go to the jury on the issue, and defendant's motion for judgment of nonsuit should have been granted.

CLARK, C. J., dissenting.

APPEAL from *Lyon, J.*, at February Term, 1910, of UNION.

This case was before this Court at Fall Term, 1909, and will be found reported in 151 N. C., 231, where, in the opinion of the Court, the nature of the action and much of the evidence are stated.

After the opinion of this Court was certified down, one W. H. Norwood was appointed guardian of the plaintiff, R. T. West, upon the allegation of his mental incapacity, and upon the petition of the guardian he was made a party plaintiff and permitted to prosecute this action. He filed complaint, adopting the allegation of the complaint and replication filed by the plaintiff West, and further alleged that on 29 January, 1910, he offered to return to defendant the amount of $1,511.61 (the amount paid to West by the defendant and accepted in full release of all damages sustained by him), with interest from 9 October, 1905; that this offer was declined upon the ground that the defendant denied the mental incapacity of West at the time the release contract was signed, and that it had any notice or knowledge thereof. It was also admitted at the trial that there was no negligence chargeable to defendant for the wreck of the passenger train on 9 September, 1904, at Whisnant's trestle, but that it was negligent in permitting a freight train to run in upon the wrecked passenger train. The issues submitted to the jury, with their findings, were as follows:

1. Did the plaintiff, at the time of receiving the voucher for $1,511.61, execute the alleged release, dated 9 October, 1905, set up in the answer? Answer: Yes.

2. Did the plaintiff, at the time of executing the said release, have sufficient mental capacity to understand the nature and effect of said release? Answer: No.

3. If not, did the defendant have notice at that time of said West's lack of mental capacity? Answer: Yes.

4. Did the plaintiff, at the time of indorsing and collecting the said voucher for $1,511.61, have sufficient mental capacity to understand the nature and effect of said voucher? Answer: No.

5. Has the said West been continuously, since 9 September, 1904, up to this time, incompetent, from want of understanding, to manage his own affairs? Answer: Yes.

6. What damage, if any, is the plaintiff, R. T. West, entitled to recover for injuries suffered by the said West as the result of the freight train running in upon the derailed passenger train, as alleged in the complaint? Answer: $8,511.61—$1,511.61= $7,000; net, $7,000.

7. Was W. H. Norwood appointed guardian of the said West, as alleged in the amended complaint filed by said Norwood? Answer: Yes.

8. Did the plaintiff Norwood, as guardian of said West, offer to return to the said defendant the money paid to the plaintiff West, with interest thereon from the time of payment, as alleged in the amended complaint filed by the said Norwood? Answer: Yes.

9. If so, did the defendant refuse to accept the return of said money? Answer: Yes.

10. Was the refusal of the defendant to accept the return of said money put upon the grounds that the defendant denied that the said West lacked mental capacity at the time he signed the said release, and received the said money? Answer: Yes.

11. Was the amount paid by the defendant to the plaintiff West a fair and reasonable compensation for the execution of said release? Answer: No.

12. Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

It will be noticed that the first, second, fourth, and sixth issues were submitted at the former trial. During the trial numerous exceptions were taken by the defendant to the rulings of his Honor in admitting incompetent testimony, excluding competent testimony, and to his refusal to give certain special instructions prayed by defendant, and to certain parts of his charge. From the judgment rendered, the defendant appealed.

Williams & Lemmond, Tillett & Guthrie, and A. M. Stack for plaintiff.

Adams, Jerome & Armfield, John D. Shaw, and Burwell & Cansler for defendant.

MANNING, J. In view of the opinion of this Court delivered in the former appeal of this case (151 N. C., 231), it is necessary, in order to sustain a recovery for the plaintiff, that an affirmative response should be made to the third issue, coupled with a negative finding to the eleventh issue. These two issues present the crucial matter of inquiry, the negligence of defendant in permitting its freight train to crash into the derailed and wrecked passenger train being admitted. This brings us to an examination of the evidence offered upon these two questions; and giving to it the most favorable construction for the plaintiff, the conclusion is irresistible that it is wholly insufficient to justify a finding upon either issue in plaintiff's favor. At best, it raises not more than a conjecture that defendant's agent making the settlement with plaintiff had notice of plaintiff's mental incapacity, assuming that such incapacity existed at that time; and it does not raise even a conjecture that the settlement made with him was unjust, unfair, or inequitable. The plaintiff's itemized claim, as presented by him to the defendant, which was approved by those interested in his welfare, was for $1,603.22; the defendant paid him $1,511.61, the difference being less than $100, or about 6 per cent. At that time the plaintiff thought, and those interested in his welfare considered the settlement satisfactory, fair, and just. There is absolutely no evidence that defendant was striving to drive a hard bargain; no suggestion of imposition, undue influence, or fraud, except that fraud, as plaintiff contends, which arises from contracting with a mental defective with notice of his mental incapacity. It will be observed that none of the plaintiff's family or friends or his attorney thought at that time that plaintiff's mental incapacity was so great as to suggest the advisability of the appointment of a guardian for him; this seems not to have occurred to them until nearly five years thereafter and after the former opinion of this Court in this case had been certified down; at least, we find no suggestion of it in the evidence.

The narrative of the circumstances of the wreck, of the correspondence between plaintiff and defendant's agent, of what took place at the time of and just prior to the settlement, of what he said and did and what Stanley said and did, given by plaintiff himself, who was examined as a witness in his own behalf, show an intelligent comprehension of the transaction and the contract, though detailed nearly five years thereafter and by a man who was adjudged *non compos mentis* at the time he was testifying.

At the time of the settlement, 9 October, 1905, more than a year after the wreck, not only did plaintiff, but his physician and his family, entertain the opinion that plaintiff would recover, but that he had in fact so far recovered that he would be able in cold weather to resume his former position as passenger conductor. The plaintiff, in his letter of 7 October, 1905, wrote that he was then and had been since 1 October, able to resume his duty as passenger conductor; and his physician, Dr. Ashcraft, wrote on 10 October, that "So far as I can see, he (Conductor West) is in as good health as he has been for the past two or three years. I think he will come out all O. K."; and he explained in his testimony that O. K. meant that he would be all right; that at the time he wrote the letter just quoted from, he wrote it for the purpose of informing defendant's superintendent that, in his opinion, the plaintiff was then as capable of running a train as conductor as he was before the wreck; that at that time his condition appeared normal to the outsider—the layman; and that though he had, at the time of the trial, changed his opinion, this change was largely due to the subsequent development of the plaintiff's disease. It also appeared that plaintiff went where he pleased, taking occasional trips from home unattended; that he wrote defendant to furnish him passes for these trips; that he went to Portsmouth to make the settlement unattended.

It cannot be said that, because defendant's agent, making the settlement, asked the plaintiff at that time if he knew the superintendent entertained some doubt of his fitness on account of his physical, mental, and nervous condition, to resume his duties as *passenger conductor,* that this question is sufficient to support the allegation that such agent had notice of plaintiff's want of capacity to make a contract or to make the settlement of his claim against the defendant that he did make on that day. It is a matter of common knowledge that every man with the mental capacity to make a contract has not the mental capacity to perform the many and delicate duties of a conductor of a passenger train. To make such a contract as the plaintiff made cannot be said, under the rulings of this Court and measured by the standard of capacity universally recognized, to require any great amount of mental capacity, especially in the absence of any suggestion of misrepresentation, imposition, or undue influence; while to discharge the many, varied, and delicate duties of conductor of a passenger train requires at all times more than the average intelligence, and especially a nervous condition not easily irritated or excited.

The correspondence between plaintiff and defendant's agent, in reference to the adjustment of his claim, extended over a period of more than a year, and all the letters, the same as at the former trial, were offered in evidence by one side or the other, and their pertinency to the phase of the case now under consideration is commented upon in the former opinion of the Court.

The additional fact appearing at the last trial, that the plaintiff himself did not, in fact, compose and prepare all these letters, but was aided by his wife, his attorney and two other friends, each, in drafting the letters, can have no effect in determining the issues now under consideration, for it is not suggested that such fact was communicated to the defendant's agent having in charge the adjustment of plaintiff's claim; on the contrary, it is evident from the testimony that the purpose of plaintiff and his friends was to conceal the fact of such aid from defendant's agent. It is insisted that the conversation of Dr. Ashcraft with Superintendent Berkley in January or February, 1905, in which Dr. Ashcraft expressed the opinion that the plaintiff would not again be mentally capable of resuming his position as conductor, was notice to the defendant and must have been communicated by Superintendent Berkley to the claims agent of defendant. Assuming this, the settlement was not made until October, some nine months thereafter, and not until the claims agent was assured by Dr. Ashcraft, in his letter, that the plaintiff would be all O. K., and by plaintiff's letter that Dr. Ashcraft had so informed him. If plaintiff's family, friends, and physician believed, at that time, that plaintiff was so mentally incapacitated by the injuries received in the wreck, or from other causes, that he was rendered *non compos mentis,* it is inconceivable that they should have permitted him to go to Portsmouth alone to adjust a matter of such moment to him and to them, and without any warning to the defendant's agent of his mental condition, a condition that was not observable to the outsider or layman, to use the words of Dr. Ashcraft.

The legal principles controlling the determination of the phase of the case presented by the third and eleventh issues are stated in the former opinion of this Court and the cases therein cited. It is unnecessary to restate them. Both the sanity of the plaintiff and his apparent mental condition, and the fairness, propriety, and equitableness of the settlement of October, 1905, must be determined by conditions then existing, of which defendant's agent was fixed with notice or knowledge. This is not controverted by plaintiff's counsel in their able and well-considered brief, and such is the ruling of the Court in the former opinion. It is further sustained by the following additional authorities: *Wells v. Roger Wheel Co.* (Ky.), 114 S. W., 737; *Cleveland C. C. and St. L. Ry. Co. v. Hilligoss,* 86 N. E., 485; *Allen v. Ruland* (Conn.), 117 Am. St., 146; *Sprigg v. Sprigg's Trustee* (Ky.), 90 S. W., 985.

Having reached the conclusion that his Honor should have allowed the defendant's motion to nonsuit the plaintiff, made at the close of plaintiff's evidence and renewed at the close of all the evidence, and that his refusal to grant this motion was error, it becomes unnecessary to consider the other interesting questions presented by the other exceptions. In disallowing the motion to nonsuit, there was error, for which the judgment is reversed. The nonsuit will be entered in the court below.

Reversed.

CLARK, C. J., dissenting: This case was before the Court upon the appeal of the defendant, 151 N. C., 231. A new trial was then granted because there was no finding by the jury that the defendant company had notice of West's mental incapacity, and because there had been no return shown of the $1,500 which had been paid to him at the time he signed the release. On the trial below, held in accordance with the order of this Court, it was found by the jury, among the other issues, that the defendant company, through Stanley, its claim agent, did have notice of West's mental unsoundness; that an offer to return the amount paid under the release had been made to the defendant company, and that the offer had been refused upon the ground that the railroad company claimed that West was of sound mind at the time the release was signed; and it was further found by the jury that the settlement made by the railroad company with West was not a fair and reasonable consideration for the execution of the release.

The second trial, therefore, cured every defect that was pointed out in our former opinion. It would seem, therefore, that the verdict and judgment upon this appeal should be affirmed. It is certainly too late now to say that there was no evidence, when two learned trial judges have thought that there was sufficient evidence to submit the issues and two impartial juries have found not only that there was evidence, but a preponderance of evidence sufficient to satisfy them upon each issue. It can always be argued that the jury upon the evidence should not have found the issues as they did. But that is the very matter which the jury was impaneled, as the constitutional triers of the fact, to determine. They heard the evidence, they listened to the argument of counsel that the evidence did or did not justify the finding which the contending parties sought upon the several issues. And the jury decided. This was their function. This is not a forum in which to compare and weigh the evidence and decide whether or not the jury have found correctly.

As stated in the opinion of the majority, the two crucial issues on this trial are:

3. Did the defendant have notice, at that time, of West's lack of mental capacity? Answer: Yes.

11. Was the amount paid by the defendant to the plaintiff West a fair and reasonable compensation for the execution of the said release? Answer: No.

The opinion of the Court rests upon the position that there was no evidence to sustain the finding upon said third issue. The plaintiff's counsel argued with great force that there was not only evidence to that effect, but that it was conclusive and overwhelming.

It appears in the evidence that the defendant's division superintendent, Berkley, and Dr. Blair, its surgeon, met Dr. Ashcraft at Monroe in January, 1905; that in that conversation Berkley said that while West had been prior to the accident one of the company's best conductors, since the accident he would be afraid to let him run a train for fear he would involve the railroad company in lawsuits and injure himself, and asked Dr. Ashcraft whether he thought West would ever be able to run again as conductor, to which the doctor replied that he did not think that he would. Dr. Ashcraft testified that he and Superintendent Berkley were discussing West's mental condition, and they agreed that on account of it he would never be able to run again as conductor. This knowledge of Berkley was the knowledge of the railroad company, and was binding upon it when its other agent, Stanley, settled with West, even if if there had been no evidence that Berkley conveyed such information to Stanley. But, independently of that, there was evidence to show that Berkley did in fact convey his knowledge to Stanley. Stanley wrote to West a letter in which he said, the very day of the settlement: "There is some question in the mind of the general superintendent and the superintendent of the third division (Berkley) as to whether your physical, *mental, and nervous* condition is such as to enable you to take your old run in the passenger service." He also wrote West: "To be perfectly frank with you, Captain, I have been told that Dr. Ashcraft has advised Superintendent Berkley that you are not in a condition to go back as conductor of a passenger train." As Dr. Ashcraft testified that he never had but one interview with Berkley, this was certainly evidence from which the jury could draw the conclusion that Berkley had informed Stanley of West's defective mental condition. The evidence shows that at the very time Stanley was preparing the release for West's signature the latter was in the supply department getting his supplies to resume his run as conductor, although Stanley admits that at that very time he knew that West would not be allowed to resume his run. West testified that he supposed he was signing a receipt for his pay during his lost time, and that he did not understand that it was a receipt for damages.

The plaintiff was injured in a railroad wreck, and while imprisoned therein, a freight train was negligently allowed to crash in upon the wreck in which he was imprisoned.

R. A. Morrow testified that he had known the plaintiff's physical condition for 15 or 20 years; that prior to the accident he was all right, but ever since that date he has been incapable by reason of want of understanding to manage his own affairs and has not had sufficient mental capacity to understand the nature and effect of the release in question.

Dr. J. M. Belk testified that he had also known him for 15 or 20 years, and that since the date of the accident, in his opinion, he has not had sufficient mental capacity to understand the effect of a contract, nor to manage his own affairs, for want of understanding.

Dr. Ashcraft testified that he was a practicing physician of 18 years' standing; was the plaintiff's family physician and formerly surgeon for the defendant; that in his opinion West has been incompetent for want of understanding, ever since the accident, to manage his own affairs, and at the time of this release he was not competent to understand its nature. He also stated the conversation with Superintendent Berkley, as above set out.

Numerous other witnesses testified to the same effect as to plaintiff's impaired mental condition ever since the wreck; among them the pastor of his church, the deputy clerk of the Superior Court, two other ministers, the editor of the town paper, several leading merchants, and many others.

In view of the overwhelming number of reputable witnesses who testify as to West's mental incapacity at the time this release was signed, and of his incapacity ever since the wreck, to transact his own business, which in fact has been carried on by others, the jury might fairly have inferred that Stanley, from observation of West's bearing at the time the release was signed, must have known thereof. In corroboration of this, Stanley testifies that he took the unusual step of having West to write at the foot of the release that he "understood" it.

In addition to all this, the company's officers must have made some inquiry, from time to time, of the condition of an old and valued servant, who had been so badly injured in the wreck, and if so, from the above concurrence of testimony of so many witnesses, the company's officers must have known his mental condition.

Add to all the above that Dr. Ashcraft testified that Superintendent Berkley and the surgeon of the road talked with him concerning West's mental condition, and they all agreed that it was defective; that Stanley wrote West that Mr. Berkley thought that West's condition would not justify his returning to the road; that West testified that he went to Norfolk to get his pay for lost time, and signed the receipt for that and not for damages, and that Stanley admits that while he was preparing the papers for this release West was in the supply department getting his outfit to resume his run, though he (Stanley) knew that West would not be allowed to return, and the grossly inadequate sum paid (about one-fifth of a just compensation, as both juries have found), and it would seem not only that there was evidence to go to the jury, that the defendant company had notice of West's mental condition, but as plaintiff's counsel contends, it was overwhelming and irresistible.

If juries cannot be permitted to find an issue upon such evidence as this, the number of cases in which they can be permitted to find the facts will be very much restricted, and their usefulness and functions as a part of our judicial system will be very much impaired.

D. M. WARREN v. COHARIE LUMBER COMPANY.

(Filed 14 December, 1910.)

Navigable Streams—Obstruction—Damages — Punitive Damages — Evidence.

In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by Revisal, 3559, there was evidence sufficient tending to show, and under correct instructions from the court the jury found, that the stream in question was navigable: *Held*, to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation.

APPEAL from *Whedbee, J.*, at August Term, 1910, of SAMPSON.

This action was brought to recover both actual and punitive damages for obstructing the Little Coharie River, a floatable stream in Sampson County. The plaintiff was floating a raft of telegraph poles from a point on the said river in Sampson County to Wilmington, N. C. The plaintiff's agent in charge gives the following account of the act which caused the injury, for which this action is brought to recover damages:

"I took the raft down the river. We left home on Saturday. A tree had blown across the river about a half or three-quarters of a mile above the mill. We found the river full of logs above this tree. They were 4 to 5 feet deep on each other. The tree had stopped them and blocked the river. We broke the logs loose and they drifted down on others. We could not get through with our raft. It was as big a mess as I ever saw. We went down to the defendant's mill and saw Mr. Clement. He had the river dammed around the big sharp bend in the river with spiling driven down. There was a tram running across the stream. He had made a new cut across the neck of this bend. We asked Mr. Clement to open the river, and he told us that he had it dammed for his benefit at the mill. There was a tree across the river a half or three-quarters of a mile above the mill which held the logs that had blocked our passage, and he told us to go up and cut that log away. He said he did not want to unlock the river and let us by at the dam; that he would lose a lot of work that he had done, and that he would have to do it over again. He said: 'Suppose I pay you some money and you turn and go back home and wait until there comes another freshet,' and by that time we would have the cut open which would let us through this channel. The cut changed the channel of the river. Mr. Warren's son said, 'What amount of money can you afford to give us?' and he said, '$25.' I said, 'Your pa will not be satisfied.' Mr. Clement then said if the river must be opened, for us to cut out the sweet-gum tree across river above and he would open up a way. He told us that the last logs above the mill in the river which had blocked our passage were not his logs; that he owned none of the logs until they were delivered into his pond. We went down and sawed out the logs before night. This was Thursday. It took us until dark to get the logs broken loose, and soon the logs would run together and block us again. We then went on down to the mill, and no effort was made to open the river that night. We went to see Mr. Clement next morning and called him up about sunrise. He said he would send some hands up the river to help with the logs. Some colored men came. They commenced work that day to open the river. They worked as hard as they could. Jake Hill, who had a raft ahead of us, got his raft through the cut. The pond was across the old channel of the river. Our raft did not get through that night, and by next morning, which was Saturday, the freshet had run out. I could have carried the poles on to Wilmington but for the obstruction. We went back to Clinton. Next week we went back to our raft and got them through by tearing them to pieces. We were delayed, as the logs had accumulated and backed up above the bridge."

The Mr. Clement referred to was the general manager of defendant; the dam across the river was built by defendant. There was evidence tending to prove that the Little Coharie River was a floatable stream. In the complaint, the allegation upon which plaintiff bases his claim for punitive damages is as follows:

"3. That the defendant has unlawfully, willfully, and deliberately dammed up said stream at its said mill so that rafts cannot pass, which obstruction is made a violation of law, and is permitted to remain in said river, although the defendant well knows that the same is in violation of law and the rights of rafters."

The following issues were submitted to the jury, which responded thereto as set out:

1. Was the Little Coharie River a public floatable stream at that point on said stream where plaintiff alleges the same to have been obstructed at the time of the alleged obstruction? Answer: Yes.

2. If so, did the defendant company unlawfully and wrongfully obstruct the same to the injury of the plaintiff? Answer: Yes.

3. What actual damages is plaintiff entitled to recover of defendant? Answer: $100.

4. Did the defendant willfully and wantonly obstruct free passage of plaintiff's raft down the Little Coharie River, as alleged in the complaint? Answer: Yes.

5. What punitive damages, if any, is plaintiff entitled to recover of defendant company? Answer: $200.

The defendant excepted to the issues submitted, and excepted to his Honor's charge on the issue of punitive damages. This charge was as follows: "That if the defendant wantonly and willfully obstructed said stream, whereby the plaintiff was hindered and delayed in conveying his raft down the same, that the jury should answer the fourth issue 'Yes,' and could award punitive damages, or exemplary damages."

There was judgment upon the verdict, and defendant appealed.

Faison & Wright and Henry A. Grady for plaintiff.
George E. Butler for defendant.

MANNING, J. In our opinion, the evidence that the Little Coharie River was a floatable stream within the definition established by the decisions of this Court was sufficient to be submitted to the jury, and, approving the rulings of his Honor upon the exceptions taken to the evidence addressed to the first issue, we cannot disturb the finding on that issue. *Comrs. v. Lumber Co.*, 116 N. C., 731; *S. v. Corporation,* 111 N. C., 661; *Gwaltney v. Land Co.*, 111 N. C., 547; *s. c.*, 115 N. C., 581. We think the plaintiff was entitled to recover upon the evidence the actual or compensatory damages sustained by him and allowed by the jury, but we do not think the evidence sufficient to be submitted to the jury on the issue of punitive damages. Section 3559, Revisal, condemns as unlawful the act of the defendant in willfully obstructing the flow of the water in the Little Coharie River; but the fact that defendant did this act is the only fact offered by the plaintiff in support of the allowance of punitive damages. There is no evidence of malice, wantonness, ill-will, trespass upon the person, or any other fact usually held essential for an allowance of punitive damages. In actions of tort, in which punitive damages are allowed, the controlling principles are very well settled by the decisions of this Court. *Downing v. Stone,* 152 N. C., 525; *Stanford v. Grocery Co.,* 143 N. C., 419; *Kelly v. Traction Co.,* 132 N. C., 368; *Ammons v. R. R.,* 140 N. C., 200; *Hansley v. R. R.,* 117 N. C., 565; *Waters v. Lumber Co.,* 115 N. C., 648; *Holmes v. R. R.,* 94 N. C., 318; *Jackson v. Tel. Co.,* 139 N. C., 347; *Remington v. Kirby,* 120 N. C., 320; *Wylie v. Smitherman,* 30 N. C., 237; *Duncan v. Stalcup,* 18 N. C., 440. In *Duncan v. Stalcup, supra,* this Court said: "In looking into the books, we find the rule in this action to be that the jury are not restricted in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant. and the degree of insult with which the trespass was committed. The plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass. In *trespass quare clausum fregit* the jury are not confined to the precise value of the subject-matter of damages, although they are not allowed to go out of the way to an unreasonable amount. In trespass to the person, the jury are permitted to punish insult by exemplary damages." In *Stanford v. Grocery Co., supra,* this Court said: "This right to punitive damages does not attach, however, as a conclusion of law, because the jury have found the issue of malice in such action against the defendant. The right under certain circumstances to recover damages of this character is well established with us; but, as said in *Holmes v. R. R.,* 94 N. C., 318, such damages are not to be allowed 'unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury.'" In *Ammons v. R. R., supra,* it is said in the concurring opinion, which is quoted with approval in *Stanford v. Grocery Co., supra:* "Such damages are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done willfully or under circumstances of oppression, or in a manner which evidences a reckless disregard of the plaintiff's rights."

The various phases of the question are elaborately presented in 2 Sutherland on Damages (3 Ed.), secs. 391-403, and sustains the doctrines enunciated by this Court. See, also, Hale on Damages, pp. 207 *et seq.; Smith v. Bagwell,* 15 Fla., 117; *Chiles v. Drake,* 2 Met., 146; 74 Am. Dec., 406; *Rath v. Eppy,* 80 Ill., 283; *Freese v. Tripp,* 70 Ill., 496; *Hauser v. Griffith,* 102 Iowa, 215; *Reddin v. Gates,* 52 Iowa, 210; *Ward v. Ward,* 51 Iowa, 686; *Jackers v. Borgman,* 29 Kan., 109; *Bactaker v. Staples,* 27 Minn., 308; 38 Am. Rep., 395; *Barr v. Moore,* 87 Pa. St., 385; 30 Am. Rep., 367; *Cole v. Tucker,* 6 Tex., 266. In all of these cases the rule is recognized and accepted that even where the act causing the injury is criminal, yet the plaintiff, suing to recover damages, must show, in order to recover punitive or exemplary damages, malice, fraud, wanton or willful disregard of his rights, or other circumstances of recklessness or aggravation, unless the crime producing the injury requires proof of one of these elements to constitute the offense.

The only injury done to the plaintiff was the delay in the transportation of his raft. There was no evidence that defendant had any information that plaintiff had or would use the river for such purpose. As we have said, the evidence contains no one of the elements essential to support the claim for punitive damages, and in the absence of such evidence, the sole fact that the act done by the defendant which caused the injury to plaintiff was a violation of the criminal law is not a sufficient foundation to support an allowance of punitive damages. His Honor should have directed the jury, upon the evidence, to answer the fifth issue, "Nothing." The finding upon that issue is set aside, and the judgment below will be so modified, and judgment entered for the actual damages allowed by the jury, interest and costs; and, as so modified, it is affirmed. The costs of this appeal will be taxed against the appellee.

Modified and affirmed.

R. H. SCHANK AND F. M. JOHNSON v. CITY OF ASHEVILLE.

(Filed 14 December, 1910.)

1. **Legislative Powers—Constitutional Law—Cities and Towns—Paving Streets—Assessment.**

The Legislature has constitutional authority to authorize a city to improve its streets by creating each street, or a portion thereof, a taxing district, and requiring a prescribed portion of the cost of the paving of said street to be assessed upon the abutting property on each side of the street, according to the frontage of each lot.

2. **Cities and Towns—Paving Streets—Prerequisites—Jurisdictional—Order—Appeal—Injunction—Equity.**

When, under a statutory authority given a city to pave its streets, it is among other things required that a petition be filed by the owners of a majority of the front feet abutting thereon and notice be given, etc., prior to an order made by the aldermen, and it appearing that the order had been made upon petition after giving the notice required by the statute, and in other respects in pursuance of the act, and no objection entered or appeal from the order as provided for: *Held*, after the expiration of five years an order restraining sale of plaintiff's property to pay for the paving will not be granted to two of the abutting owners on the street, upon the ground that a majority, as provided, of the abutting owners had not in fact signed the petition; (1) the assessment and levy, as made, had the effect of a judgment and lien; (2) though the petition was a prerequisite, it was not jurisdictional, and the order, in effect, was a finding that the petition was true, and, not appealed from, was conclusive; (3) the statutory notice made the plaintiffs parties to the proceedings; (4) the granting of a restraining order after five years would be inequitable to the other taxpayers and property-owners of the town.

APPEAL by defendants from order restraining them from selling plaintiffs' property to pay for paving a street, made by *Justice, J.*, at chambers in Asheville, 26 April, 1910. Action from BUNCOMBE.

The facts are sufficiently stated in the opinion of *Chief Justice Clark.*

Frank Carter, H. C. Chedester, and Wells & Swain for plaintiffs.

S. G. Barnard for defendant.

CLARK, C. J. On 4 August, 1905, the Mayor and Board of Aldermen of Asheville adopted an order that Southside Avenue from South Main Street to Depot Street be paved with bitulithic composition. This the aldermen were authorized to do by Private Laws 1901, amended by chapters 283 and 401, Private Laws 1905. As foundation for the order there was a petition filed with the mayor and board of aldermen purporting to represent the owners of a majority of the front feet abutting on said avenue, as required by the statute. Notice was given prior to said order in the manner required by said statute. There was no exception to nor appeal from said order, as the statute authorized, and the city proceeded to have the avenue paved. No objection was made till after the work was completed, and not till 26 February, 1910, when two of the owners of land abutting upon said avenue instituted this proceeding to restrain the defendant from advertising and selling their property for the assessments which had theretofore been levied for their pro rata part of the cost of said improvements.

The constitutional authority of the Legislature to authorize a city to improve its streets by creating each street, or a portion thereof, into a taxing district and requiring a prescribed portion of the costs of the paving of said street (here one-third) to be assessed upon the property abutting on each side of the street, according to the frontage of each lot, has been too often decided by this Court to be open to debate. Indeed, the exact point was passed upon in *Raleigh v. Peace,* 110 N. C., 32, and has been reaffirmed in *Hilliard v. Asheville,* 118 N. C., 845; *Alvey v. Asheville,* 146 N. C., 395, and other cases. This statute provided methods whereby each lot-owner might contest the assessment, and might except and appeal.

The plaintiffs practically rest their contention upon the provision in the statute that the board of aldermen should not make an order for the improvement of a street in the part of the city where this street lies "unless and until" a majority of the abutting landowners, in front feet, upon said street shall petition the board of aldermen to make such order. The plaintiffs, who are two of said abutting landowners, now allege that in fact a majority of the landowners, in front feet, upon said street did not join in the petition, because that one of them signed as agent and was not an owner himself of the property, they allege; and they obtained a restraining order to prevent the sale of their property for the assessment laid upon it until that matter can be investigated.

The plaintiffs made no objection to the order, of which notice was given in the manner required by the statute, and took no appeal, though they saw the work begun and all during its execution. For five years they have stood silent until after the work has been completed. Now they wish to throw the cost of the work of improving the street in front of their own doors (which has been paid by the owners of the abutting property upon all other streets which have been improved under the same provisions of the charter) upon all the citizens of the town, to their own exoneration.

Their contention is that the requirement that a majority, in front feet, of the owners of the abutting land shall sign the petition is a jurisdictional matter, and, therefore, that if they can show that a majority did not so sign, the defect is jurisdictional and the judgment is void. The requirement in question is a prerequisite, it is true, but it is not jurisdictional. If the board erred in that matter it was erroneous, and to be corrected by an appeal. The plaintiffs were in court in the manner provided by the statute. The judgment is not void. It cannot be attacked collaterally. In an action for debt, it is a prerequisite to a judgment that the defendant owes the amount; in an action of ejectment, it is a prerequisite that the plaintiff has the true title to the land; in a proceeding to levy an assessment upon the abutting landowners, under the statute for the improvement of a street in Asheville, it is a prerequisite that a majority, in front feet, shall sign the petition. In none of these cases can a judgment be properly rendered "unless and until" such prerequisite is complied with; but in each and all of them, alike, when the parties have been properly made, and are given opportunity to be heard, and the statute provides for an exception and appeal, the parties are bound by the judgment. If they fail to except and appeal, they cannot afterwards procure an injunction against the execution of the judgment upon the ground that the prerequisite was not complied with. If such allegation were true, the judgment would be simply erroneous, but not void; and not being appealed from, it is conclusive. "Having been silent when they should have spoken, they cannot now be heard when they should be silent."

The assessment and levy by the board of aldermen in this case had the effect of a judgment and lien. It was made after due notice to the parties, in the manner required by the statute, and upon a petition in writing which upon its face was signed by the required majority, in front feet, of the abutting landowners. The order is in effect a finding that the petition was true. It need not be expressly so recited. An order of this kind unappealed from is conclusive that a majority of the abutting landowners signed the petition, when that is a prerequisite under the statute. *Scranton v. Jermyn,* 156 Pa. St., 107; *Osborne v. Sutton,* 108 Ind., 443; *Tucker v. Sullivan,* 130 Ind., 514; *Spaulding v. Homestead,* 87 Cal., 40.

Especially are the plaintiffs without equity when for five years they have stood silently by when the street before their doors was being improved to the enhancement of their property, and they have made no complaint until after the work has been finished. The cost thereof cannot be shifted upon the shoulders of all the other citizens of the town, most of whom will receive very slight benefit, if any, from the improvement of this street, and many of whom have already paid their own assessments for the improvement of the street in front of their own property.

There was error in granting the restraining order. The plaintiffs have failed to state a cause of action.

Action dismissed.

H. N. WEST, ADMINISTRATOR, v. BREVARD TANNING COMPANY.

(Filed 14 December, 1910.)

1. **Nonsuit—Evidence, How Considered.**

Where a motion to nonsuit is made under the statute, the evidence must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found those facts from the testimony.

2. **Master and Servant—Safe Place to Work—Appliances—Duty of Master.**

The master is not a guarantor of the safety of the servant when engaged in the discharge of his duties, but he is required to use reasonable care and prudence in providing him a safe place to work, and in the selection of such machinery and appliances as are reasonably fit and safe and in general use, and such as a man of ordinary prudence would use, having regard to his own safety, were he supplying them for his own personal use. He is not responsible for a mere error of judgment in their selection, if he exercises due care.

3. **Master and Servant—Safe Place to Work—Appliances—Burden of Proof.**

In order for a servant to recover damages of the master for an alleged failure to furnish safe machinery and appliances, the servant must show, (1) that the implement furnished by the master was, at the time of the injury, defective; (2) that the master knew of the defect or was negligent in not discovering it and making the needed repairs; (3) that the defect was the proximate cause of the injury.

4. **Master and Servant—Safe Place to Work—Appliances—Defects—Notice Implied.**

In this case, the unsafe construction of a platform dangerously situated, and erected and permitted to remain for a long time in an unsafe condition, upon which plaintiff was required to go in the performance of his duties, was evidence sufficient to give defendant implied notice thereof, in the performance of its duties to carefully inspect, at reasonable intervals of time, the implements, ways and appliances provided for the use of its servant.

5. **Same—Negligence—Proximate Cause—Causal Connection.**

In an action to recover damages for the wrongful killing of plaintiff's intestate by defendant's negligence in not furnishing him a safe place to work in its tanning works, there was evidence tending to show that the intestate, a lad of 16 years, was employed to oil machinery over vats of water heated from 200 to 210 degrees Fahrenheit, on a platform 8 or 9 feet square, upon which was placed the machinery, consisting of sprocket wheels, belting, etc.; that the platform had been permitted to become filthy and greasy with oil, and was without a guard-rail, but surrounded by a beam forming a rim around its edges 10 inches high, leaving an insufficient space of 10 or 12 inches between the outer rim and the sprocket wheel within which the intestate had to step in oiling; that the usual covering of the vat had, in the lapse of time, been eaten away by acid used in tanning, and that plaintiff was killed by falling into the vat of hot water: *Held*, (1) evidence sufficient to go to the jury upon the question of defendant's negligence in failing to provide the intestate with a safe place to work; (2) the failure to supply such a place was the proximate cause of the injury, there being no evidence in the case of contributory negligence; (3) the struggle of the intestate to keep from falling from the platform, as shown by the handprints and footprints on the grease and dirt, was evidence sufficient, in itself, to show that plaintiff had not otherwise fallen into the vat.

APPEAL by defendant from *Justice, J.*, at March Term, 1910, of BUNCOMBE.

The facts are sufficiently stated in the opinion of *Mr. Justice Walker.*

Jones & Williams and Craig, Martin & Thomason for plaintiff.

Merrick & Barnard for defendant.

WALKER, J. This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. The defendant moved for judgment as of nonsuit, which motion was refused, and the only question for our consideration is, Was the evidence sufficient to be submitted to the jury, who found by their verdict that there was negligence which was the proximate cause of the injury, and that the intestate did not, by his own negligence, contribute to the injury which caused his death. In passing upon the single exception, we are restricted to a certain view of the evidence by a well-settled rule of law which we have formerly stated as follows: "Where a motion to dismiss an action is made, under the statute, the evidence must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found those facts from the testimony." *Cotton v. R. R.,* 149 N. C., 227; *Brittain v. Westhall,* 135 N. C., 492; *Freeman v. Brown,* 151 N. C., 111; *Deppe v. R. R.,* 152 N. C., 79.

The statement of a few of the salient facts which the evidence tends to establish will suffice for the purpose of testing the soundness of the position taken by the defendant's counsel in support of the motion for a nonsuit. The defendant, at the time of the injury to the intestate, was a corporation engaged in the business of extracting tannic acid from chestnut wood by means of machinery and other appliances. The process by which this was done was fully explained by the witnesses. The wood is chopped very fine and boiled in large vats or tubs 14 feet in diameter, the tops of which were about 30 inches above the level of the floor of the defendant's leech-house. Over tub No. 1 there was a platform 8 or 9 feet square, on which rested the machinery, consisting of sprocket wheels, belting, shafting chains and gearing. The platform was surrounded by a beam which stood above it about 10 inches, thereby forming a rim at its outer edge; the space between the beam and the machinery was in width about 10 or 12 inches, barely leaving room for a person to step between the sprocket wheel and the beam. This was the walkway for the use of the intestate in performing his work. There was no railing around it. The gangway and beam were covered with oil and grease and were very filthy and slippery. There was no lid or covering to the vat, the temperature of the liquid in which ranged at times from 200 to 210 degrees Fahrenheit. There had been a lid on the vat, but by long usage and the effect of the acid on the wood of which it was made, it had fallen off from decay. The intestate was employed by the defendant as oiler of the machinery. He was 16 years old, and to perform the duty assigned to him he was required to go upon the platform at the point directly above the vat. While engaged in leaning over and oiling a part of the machines on 19 July, 1905, and, as the jury found, without any fault on his part, his foot slipped over the greased surface of the platform and beam and he fell in the seething caldron below, after struggling to save himself, and was so badly scalded that his death soon followed from the injuries he received.

We cannot adopt the suggestion of the defendant that the intestate did not slip from the platform, but fell in the vat in some other way, because there is abundant evidence to show that, while no one saw the intestate when he fell, there were footprints and hand-prints indicating that intestate had slipped and attempted to catch as he fell from the platform. Upon this showing by the plaintiff—and we have not stated even the substance of all the evidence—the defendant contends that there is no sufficient proof of negligence. The plaintiff, on the contrary, imputes negligence to the defendant in two respects: (1) That it failed to cover the vat of boiling liquid, when by the relative position of the vat and the platform over it and the peculiar construction of the latter, especially with reference to its width, the position of an employee required to use it in performing his work was rendered dangerous. (2) That it neglected to provide a reasonably safe platform where the intestate could stand while oiling the machinery, and allowed the one it did provide to become saturated with oil and grease so that it afforded but a very precarious footing for the intestate and other employees, for whose use it was erected, and that they were thereby unnecessarily exposed to danger when performing their work.

The master does not guarantee the safety of his servant while engaged in the discharge of his duties. He is not an insurer, and is not bound to furnish him an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements, and appliances, but only such as are reasonably fit and safe and in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one and recommended for our guide in all such cases. It measures accurately the duty of the employer and fixes the limit of his responsibility to his employee. So that the liability of the employer to the employee in damages for any injury the latter may receive while engaged in his work depends upon whether the employer has been negligent. In respect to instrumentalities provided by the master for the use of the servant, the latter, in order to establish his case, must show: (1) That the implement furnished by the master was, at the time of the injury, defective. (2) That the master knew of the defect, or was negligent in not discovering it and making the needed repairs. (3) That the defect was the proximate cause of the injury. *Cotton v. R. R.,* 149 N. C., 227; *Marks v. Cotton Mills.* 135 N. C., 290; *Harley v. B. C. M. Co.,* 142 N. Y., 31; *Avery v. Lumber Co.,* 146 N. C., 592; *Berkley v. Waste Co.,* 147 N. C., 585; *Hudson v. R. R.,* 104 N. C., 491; *Shaw v. Mfg. Co.,* 143 N. C., 131; *R. R. v. Narrett,* 166 U. S., 617. These duties which the master owes to his servant cannot be delegated.

We may omit any discussion of the duty of the servant to inform the master of any defect found by him and of which the master is ignorant, as it is not essential to his liability for an injury upon the ground of negligence that he should actually know of the defect, for he owes to the servant another duty, which is to carefully inspect, at reasonable intervals of time, the machinery, implements, ways and appliances provided for the use of his servant in the performance of his work. 1 Labatt M. and S., secs. 154 and 157; Bailey's Pers. Inj., sec. 2638; *Leak v. R. R.,* 124 N. C., 455; *Cotton v. R. R., supra.* There is abundant evidence in this case to show that if the defendant did not have actual knowledge of the defect, it had what is its legal equivalent, the full opportunity, by inspection, to discover it. The defect in the platform was surely the proximate cause of the injury to the intestate, resulting in his death, so that the only remaining question to be considered is, Was the defect a negligent one or caused by the failure of the defendant to exercise that degree of care which his duty to his servant required of him under the facts and circumstances, as detailed in the record? We will proceed now to a brief discussion of this matter in the light of the established principle governing such cases.

The jury have acquitted the intestate of any negligence, and we have found no evidence, or any combination of facts fairly inferable from the testimony, which tends to impeach the correctness of this conclusion or to show any culpable negligence on the part of the intestate. It may fairly be deduced from the evidence that if the platform had been either wider or protected by a rail, or, in the absence of either of these precautions against injury to the servant, if the platform, as it was constructed, had been kept clean or free from oil and grease which made it slippery, the intestate could have oiled the machinery in safety, and the terrible agony which he suffered and his subsequent death would not have occurred. The adoption of a few simple and precautionary measures, comparatively inexpensive, would have prevented the injury and saved his life.

The plaintiff, in order to show negligence, was not confined to proof of any single or special defect, for he might rely upon all of them—the narrowness of the platform, its saturation with oil, and the absence of a guard-rail or other sufficient protection against slipping and falling into the vat.

In *Aiken v. Mfg. Co.,* 146 N. C., 324, we held there was evidence of negligence, where it appeared that the plaintiff had slipped on a platform, which had become wet from the rain, and fallen to the ground. "There was ample evidence (said *Justice Connor* in that case) of negligence on the part of the defendant in failing to provide a reasonably safe way for the plaintiff to perform the service required of him. The failure to provide the platform or gangway with a railing approaches very closely to negligence *per se;* it clearly justified the jury in finding that it was dangerous."

The case of *Mundhenke v. Oregon City Mfg. Co.*, 1 L. R. A. (N. S.), 278, presents a state of facts much like those we find in the record before us. The plaintiff slipped on a greasy floor while walking through an aisle or passageway and fell on machinery which was in motion, so that his hand was brought in contact with the gearing and severely injured. The Court said, with respect to the question of negligence: "The condition and pertinent fact are so peculiarly a matter for the jury that we are not disposed to take it away from them. The gearing was very near the place in which the plaintiff was depositing the filling, and a misdirection of the hand in but a few inches would carry it to the point of danger; and it is reasonably inferable that the slipping of the foot was the adequate proximate cause of the accident. It is but a humane duty that the employers of youth about factories should observe every reasonable precaution to protect the comparatively unwary from accident and disaster. If the gearing in the present case had been covered or hooded, which could have been done at a trifling expense, no accident could have happened; and if the aisle had been kept clean of grease, it is quite probable that the result would have been avoided."

The evidence, in the favorable view to the plaintiff we are privileged to take of it, tends to show that the defendant did not comply with its duty to the intestate by providing him with a reasonably safe place to perform his work, in the exercise of that ordinary care and prudence in the conduct of its business which the law exacts of it, and it does not appear, at least with sufficient conclusiveness, that there was any fault on the part of the intestate which requires us to hold against him upon a motion to nonsuit.

The defendant has not pleaded the assumption of risk (*Dorsett v. Mfg. Co.*, 131 N. C., 261; *Bolden v. R. R.*, 123 N. C., 614), even if the danger to the intestate was so obvious in this instance, and under the facts and circumstances, as to require the application of that doctrine.

There was no error in the ruling of the court to which exception was taken.

Affirmed.

JESSE SIMPSON v. SOUTHERN RAILWAY COMPANY.

(Filed 14 December, 1910.)

Master and Servant—Duty to Instruct—Safe Place to Work—Negligence—Accident.

In an action for damages for injury to plaintiff's foot caused by the falling of a cross-tie upon it while he was at work with two other hands on a car leveling ties, it appeared that the ties had been placed on the car at either end, leaving a space in the middle of the car, where plaintiff was at work, the others working on either side of one of the piles. The hands were left to do the work in their own way, without any special instruction as to the manner of doing it. While they were moving the ties one or two of them fell from a pile, causing the injury: *Held*, (1) the work was simple, requiring no more than ordinary skill and experience, and no instruction as to it was required; (2) the doctrine that it is the master's duty to provide the servant a safe place to work is inapplicable to the facts; (3) the injury was the result of an accident, and the plaintiff cannot recover.

APPEAL by defendant from *Webb, J.*, at August Term, 1910, of RUTHERFORD.

The facts are sufficiently stated in the opinion of *Mr. Justice Walker.*

No counsel for plaintiff.
Solomon Gallert and W. B. Rodman for defendant.

WALKER, J. This action was brought to recover damages for an injury to the plaintiff, alleged to have been caused by the defendant's negligence. Plaintiff and two other employees had been engaged in loading a flat car, which was attached to a "material or work train," with ties taken from an abandoned section of the defendant's road. The ties were piled at each end of the car and toward the middle, where a vacant space was left. The train was moved out and onto the main track, where the hands were ordered to level the ties by placing some of them in the middle of the car. The plaintiff and the two other hands who assisted him got upon the car, the plaintiff standing between the two piles of ties and the others on either side of one of the piles. While they were moving the ties one or two of them fell from the pile and injured the plaintiff's foot. It does not appear with any degree of certainty what caused the ties to fall, unless it was insufficient support or accidental jostling. If they had been carelessly placed upon the car, the plaintiff was as much responsible for their condition as the other hands; but the evidence does not justify the imputation of negligence to any of them in the manner of doing the work. For all that does appear, it was just one of those accidents which sometimes occur without our being able to ascribe it to any particular cause. It would seem to come within the definition of an accident, which is "an event resulting from an unknown cause, or an unusual and unexpected event from a known cause; chance; casualty" (*Crutchfield v. R. R.*, 76 N. C., 322), and, as we said in *Martin v. Mfg. Co.*, 128 N. C., 264, when an injury results from an event taking place without one's foresight or expectation, or an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not anticipated, the consequences must be borne by the unfortunate sufferer, who is without legal remedy in such a case.

Our reading and study of the evidence, as set forth in the record, does not disclose any act of negligence on the part of the defendant. If there was any negligence at all, it could better be imputed to the plaintiff in taking his position on the car between the two piles of cross-ties, if it was a dangerous one, than to any one else. The hands did the work assigned to them in their own way and without any special instruction as to the manner of doing it, and there is nothing to indicate that it was of such a character as to be inherently dangerous or likely to result in injury to any one, if carefully done. There was nothing in its nature which called for anything more than ordinary skill or even any experience in work of a like kind. The plaintiff required no instruction as to the proper method of doing so simple a piece of work. That degree of care which every man of reasonable prudence exercises in the ordinary affairs of life would have been a sufficient safeguard against injury. The recent decision of this Court (at this term) in *Warwick v. Oil and Ginning Co.*, 153 N. C., 262, states the rule of law applicable to the facts of this case. We there held that an employer's duty to provide for his employee a reasonably safe place to work does not extend to ordinary conditions arising during the progress of the work, where the employee, doing his work in his own way, can see and understand the dangers and avoid them by the exercise of reasonable care. In that case the plaintiff was feeding a conveyor with cotton seed. While standing on the pile of seed, which gradually poured into the conveyor, the seed slipped or gave way and his foot was caught in the machinery and injured. We held that a judgment of nonsuit should have been awarded, there being nothing in the construction of the machinery or in the nature of the work to show any negligence. See, also, *Brookshire v. Electric Co.*, 152 N. C., 669; *House v. R. R.*, 152 N. C., 397; *Keck v. Telephone Co.*, 131 N. C., 277; *Lassiter v. R. R.*, 150 N. C., 483; *Alexander v. Mfg. Co.*, 132 N. C., 428; *Dunn v. R. R.*, 151 N. C., 313.

The principle stated in *Covington v. Furniture Co.*, 138 N. C., 374, and quoted from Labatt on Master and Servant, 333, has some application to the facts of our case: "The general rule of law is that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care. . . . This rule is especially applicable when the danger does not arise from the defective condition of the permanent ways, works, or machinery of the master, but from the manner in which they are used, and when the existence of the danger could not well be anticipated, but must be ascertained by observation at the time." This rule was first stated in *Lothrop v. R. R.*, 150 Mass., 423, where many cases are cited.

A careful examination of the case leads us to the conclusion that if the injury to the plaintiff was caused by negligence, it was not that of the defendant, and the motion for a nonsuit should have been granted. The action should, therefore, be dismissed, and judgment to that effect will be entered in the court below.

Reversed.

W. B. COUNCILL v. C. M. BAILEY.

(Filed 20 December, 1910.)

1. **Equity—Contracts—Specific Performance—Pleadings—Prayers for Relief.**

   In a suit for specific performance brought by the vendor, the measure of the kind of relief a court of equity will grant is not necessarily determined or controlled by the relief demanded in the complaint, but by the facts set out in the pleadings.

2. **Same—Measure of Relief.**

   Plaintiff in an action against the vendee alleged in his complaint that the latter had entered into a written contract with him for the purchase of certain lands, and he had tendered him a good and sufficient deed in accordance with the terms and conditions of his contract to convey, and prayed for a judgment for the purchase money, adding a general prayer "for such other and further relief to which he may be entitled": *Held*, sufficient to warrant a judgment for a specific performance of the contract in every respect, including a declaration of a vendor's lien upon the land and a direction for a sale thereof to satisfy the debt.

3. **Equity—Contracts—Specific Performance—Vendor's Lien—Sales—Removal of Causes.**

   When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is removable to the county in which the land is situated. Revisal, sec. 419.

APPEAL from *Webb, J.*, at May Term, 1910, of CATAWBA.

This action was brought to recover the sum of $6,000, alleged to be due by the defendant under a contract with the plaintiff to purchase from him a tract of land in Rowan County. Plaintiff alleged that he entered into a written contract with the defendant whereby he agreed to sell and convey to him his farm in the said county for $6,000; that he tendered a deed for the land and demanded the payment of the purchase price.

The defendant objected to an exception in the deed of certain timber on the land, whereupon the plaintiff tendered, with the deed, a collateral agreement which he alleged had the effect of removing the objection raised by the defendant; but he again refused to pay the money and accept the deed, even with the agreement, for the stated reason that he had made, or was about to make, other investments and would not be able to pay for the land.

The plaintiff further alleges his readiness and ability to perform his part of the contract, and renews his tender of the deed and the agreement to the defendant, although he is not bound, as he is advised, to tender the agreement, as the objection of the defendant to the deed is not a valid one, and the plaintiff's tender of the deed is sufficient compliance by him with the terms of the agreement.

In a second cause of action the plaintiff seeks to recover damages which he has suffered by reason of a breach of the contract by the defendant.

Before the time for answering had expired, and before any answer was actually filed, the defendant requested the court, in writing, to remove the case from the county of Catawba, where the plaintiff resides, to the county of Rowan, where the land is situated and the defendant resides. The court refused to change the place of trial. The defendant excepted and appealed.

In his answer, the defendant denied all of the material allegations of the complaint and specially averred that the Salisbury Realty and Insurance Company, alleged in the complaint to have made the contract of purchase on his behalf, was not his agent and had no authority to make any such contract for him, and further, that neither the defendant nor any one in his behalf with authority to do so has ever made or signed any contract or any note or memorandum thereof in writing for the purchase of the said land.

M. H. Yount, W. A. Self, and A. A. Whitener for plaintiff.
W. P. Bynum and Clement & Clement for defendant.

WALKER, J., after stating the facts: We need not consider the question, which was much debated before us, whether an action for the specific performance of a contract to convey land is in form or effect one for the recovery of land, or any estate or interest therein, or for the determination of such right or interest within the meaning of those words as used in Revisal, sec. 419, which requires actions of that character to be tried in the county wherein "the subject of the action, or some part thereof, is situated," subject to the right of removal in cases mentioned in the statute. Even if a suit for specific performance be considered as strictly one *in personam*—and this question we do not decide—there is another clause of the statute which applies to this case and localizes the action. It is provided in the same section that an action for the foreclosure of a mortgage must be tried in the county where the subject of the action, or some part thereof, is situated. In *Fraley v. March,* 68 N. C., 160, which was an action for the specific performance of a contract by the assignee of the vendor against the vendee, the court held that "the law of the *venue* of actions, with reference to the residence of the parties, does not govern this case, but the law of the *venue*, with reference to the 'subject of the action.' It is substantially an action 'for the foreclosure of a mortgage of real property,' and that must be tried in the county where the land is situate." It is true, the plaintiff in that case expressly prayed that the land be charged with the payment of the note remaining unpaid, and that it be sold and the proceeds applied in satisfaction of the balance of the purchase money due by the defendant, the vendee; but he would have been entitled to that relief without any specific prayer for it, upon the facts alleged in his complaint. It is not the form of the demand for relief which will determine the measure or the kind of relief that will be granted, but the facts set out in the pleading. Pell's Revisal, secs. 463 (3) and 565, and cases cited.

In *Knight v. Houghtalling,* 85 N. C., 17, the Court said: "We have not failed to observe that the answer of the defendants contains but a single prayer for relief, and that for a rescission of their contract. But we understand that, under The Code system, the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and the facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be *inconsistent* with the pleadings and proofs. In other words, The Code has adopted the old equity practice when granting relief under a *general prayer,* except that now no general prayer need be expressed in the pleadings, but is always implied." *Vorhees v. Porter,* 134 N. C., 591.

In this case the plaintiff, it is true, asks for a judgment for the purchase money, but he adds a general prayer "for such other and further relief as he may be entitled to"—that is, not only for a money judgment, but that he may also have full relief according to the facts he has alleged, and within the scope of the case made by his complaint, the allegations of the complaint being sufficient in form and substance to fully warrant a judgment for a specific performance of the contract in every respect, and at least for the declaration of the vendor's lien upon the land and a direction for a sale thereof to satisfy the debt. Even under the former system, when the two jurisdictions of equity and law were kept separate and distinct, it was settled by actual adjudication and the highest authority that "a prayer for general relief covers and includes a prayer for specific performance," or any particular relief permitted under a general prayer, where the statement in the body of the bill was sufficient to authorize the granting of such specific relief. *Tayloe v. Ins. Co.,* 9 How. (50 U. S.), 390. "We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless, the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and, under that, such appropriate decree as the facts might be found to justify could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that were also essential." *Kansas v. Colorado,* 85 U. S., 145; Daniel Ch. Pr. (4 Am. Ed.), 380.

It was held in *Jones v. Van Doren,* 130 U. S., at p. 692, that when specific relief is demanded a court of equity will decree such relief as the facts stated in the bill will justify and which is essential to render the specific relief which is sought by the bill complete and effective, if there be a prayer for general relief. *English v. Foxall,* 2 Peters, 595; *Texas v. Hardenburg* (sometimes cited as *Texas v. White*), 10 Wall., 68; *Stevens v. Gladding,* 17 How. (58 U. S.), at p. 455; *Railway v. Trust Co.,* 79 Fed. Rep., at p. 187.

If the plaintiff makes out his case, as stated in the complaint, at the final hearing, he will be entitled, upon the present frame of his pleading and prayer for relief, not only to a judgment for the recovery of the purchase money, but also to a declaration of his lien upon the land as a security for the debt, and, besides, to an order for the sale of the land and the application of the proceeds of sale to the payment of the debt; and if they are not sufficient for that purpose, then to judgment for the excess. *R. R. v. Trust Co., supra.*

Returning to the original proposition, if it be true, that an action of this kind is in substance, though perhaps not in form, one for the foreclosure of a mortgage, or, more properly speaking, a lien in the nature of a mortgage (*McKay v. Gilliam,* 65 N. C., 130), it should be tried, under our statute, in the county where the land lies. In *Scarlett v. Hunter,* 56 N. C., 84, this Court held that where there is a contract for the sale of land, the vendee is considered, in equity, as the owner and the vendor retains the title as security. He may rest satisfied with this security as long as he chooses, and when he wants the money, he has the same right "to compel payment" by a bill for specific performance as the vendee has to call for the title. The remedy is mutual. In *Connor v. Dillard,* 129 N. C., 50, the cause of action was for the recovery of the amount due upon a note given for the purchase money of land under a contract of sale. There was a stipulation that there should be no personal liability of the vendee, but that the debt should be collected only out of the land. Plaintiff asked merely for a judgment for the debt and a satisfaction of it by a sale of the land, not under an order or decree of the court, but by the ordinary process of execution, and it was held that the action was "substantially one for the foreclosure of a mortgage," and the action should have been removed, upon application, to the county where the land was situated. It will be noted that the plaintiff prayed for a judgment for the amount of the debt, to be satisfied only by a sale of the land under execution, whether it brought enough to fully pay the judgment or not. Wherein does that case differ in principle from this one? In this case the plaintiff asks for judgment upon the debt, and under his general prayer it can be satisfied by a sale of the land, and he will further be entitled to judgment for the excess of the debt if the proceeds of the sale are not sufficient to pay it; but this does not differentiate the two cases. It is the right of the plaintiff to subject the land by sale to the payment of the debt that renders this suit analogous to one for the foreclosure of a mortgage, and when this is done under an order or decree of the court, it is more like a foreclosure suit than when the sale is made under an ordinary execution which may issue in a case at law. It is true that a mortgagee may sue for his debt without asking for a foreclosure, and collect the money by execution upon his judgment; but this is not what the plaintiff has done in the case before us, for he asks for more. There is a special prayer for judgment for the debt, and then a general prayer for further relief. What other relief can he possibly have awarded except an order for the sale of the land? And even if there is any other, we have seen that he is also entitled to such a sale under his general prayer—in other words, to complete relief in every respect covered by the allegations of his complaint. Fry on Spec. Perf. (3 Ed.), sec. 1138 *et seq.*

This Court has recently held in *Ormand v. Bridgers,* 148 N. C., 375, that such a motion as this one must be considered with reference to the questions that may be raised by the pleadings, and do not depend for their decision solely upon the allegations of the complaint. But in our case the sale of the land to pay the debt is within the scope, not only of the complaint, but of the prayer for relief.

In *Barnes v. Strong*, 54 N. C., 100, it was held that a decree for a specific relief will be granted under the general prayer in the bill, provided it is not inconsistent with the specific relief prayed, and is according to the allegations of the bill, that is, within their scope, so that if they are admitted or established by proof, the relief follows, as a matter of course, in order to administer complete relief and settle the entire controversy. Adams Eq., 309; Mitford Ch. Pl., 39; 1 Madd. Ch. Pr., 171, are cited as settling the practice in this respect. In that case the complainant was granted relief for which he had not specifically prayed, under his general prayer, it being within the general scope of his bill.

Our present procedure is more liberal, if anything, than was that of the former court of chancery, for now we have held that no general or even specific prayer is necessary, as a proper prayer is implied. *Knight v. Houghtalling, supra.* Relief is granted upon the case presented by the pleadings and afterwards established by proof.

Can it be said that the plaintiff will not be entitled to have the land sold to pay the judgment as the complaint now stands? The authorities we have cited, and many others, answer this question in the affirmative, and this being so, the case falls directly within the rule stated in *Fraley v. March, supra*, and *Connor v. Dillard, supra.* It should, therefore, have been removed.

Reversed.

J. W. JONES AND F. N. TAYLOR v. T. E. BALSLEY ET AL.

(Filed 20 December, 1910.)

1. **Deeds and Conveyances—Warranty—Locus in Quo—Location—Issues.**

In an action for damages for breach of warranty in a deed for lands, when it is alleged in the complaint that judgment had been recovered by a third person for a part of the lands upon a title paramount, which is not denied, but the answer alleges that the lands were not embraced in the deed containing the warranty sued on, the issue raised is as to the true location of the land, and does not embrace the paramountcy of the title.

2. **Same—Judgment—Estoppel of Record.**

In an action for damages for breach of warranty in a deed for lands, there was evidence tending to show that in a suit regularly instituted and tried, one W. and others had recovered from plaintiffs a part of the land covered by defendants' warranty. In the former suit nothing appeared to indicate that the location of the land was involved, and in the present suit the issue was whether the *locus in quo* was embraced by the deed and warranty: *Held*, the plaintiff was not estopped by the record in the original suit to show the true location of the land and that the title was protected by the warranty, and, further, to allege and prove damages in his action upon the covenant, it having been only necessary for the plaintiff in the former suit to show paramountcy of title.

3. **Instructions, Form of—Specific Issues.**

When an action is tried upon specific issues framed to ascertain the facts involved, a prayer for a special instruction that "if the jury believe the evidence, the plaintiff is entitled to recover," may be disregarded.

4. **Deeds and Conveyances—Damages—Notice to Covenantor—Reasonable Attorneys' Fees.**

The grantee in a deed, with warranty, to lands, being sued for title and possession of a part thereof, informed the warrantor of the pendency of the action, stating that he intended to defend the suit: *Held*, notice sufficient in law to charge the covenantor with all costs incurred by the covenantee in defending the action in good faith, including reasonable attorneys' fees, as such were impliedly within the contemplation of the parties, though no express request was made of the covenantor to defend the action, the notice given, under the circumstances, being a sufficient "tender of the defense."

5. **Same—Instructions.**

In an action against the covenantor, an instruction that the covenantee may recover attorneys' fees paid by him in defending an action brought to recover the land embraced in his deed and warranty, leaves out of consideration the reasonableness of the fees, and is reversible error; and when the costs and attorneys' fees are blended by the jury in one sum in the answer to the issue, a new trial will be awarded thereon.

APPEAL from *Lyon, J.*, at August Term, 1910, of GUILFORD.

The plaintiff brought this action to recover damages for a breach of a covenant of warranty. T. E. Balsley, as executor of Jacob B. Balsley, on 26 February, 1898, in consideration of $3,600, executed a deed to the plaintiffs for a lot in the city of Greensboro, which is described in the complaint. At the same time the defendants, referring to the said deed, covenanted with the plaintiffs, their heirs and assigns, "that the title to the property was vested in the said Jacob B. Balsley, and that the same is free from all encumbrances, and that the said T. E. Balsley as executor is authorized and empowered to sell the same, and that they will warrant and defend the title to the same against the lawful claims of all persons whatsoever." The evidence tended to show that, in a suit regularly instituted and tried, Eugenia Watlington and others as plaintiffs recovered of the plaintiffs in this case a part of the land conveyed by the deed of T. E. Balsley, executor, to them, the title to which is protected by the covenant of warranty. The defendants in that suit informed the covenantors of the pendency of the action on their covenant, though they did not request them to defend it, but stated, at the time of giving the notice, that they intended to defend the suit. They employed attorneys, defended the suit, and lost a part of the land by the judgment therein. The taxed costs amounted to $138.65; attorneys' fees, paid by them, to $175, and the damages assessed by the jury to $135. The plaintiffs in this action alleged in their complaint that they had been ousted or evicted by the plaintiffs in the former suit, who held the paramount title. The defendants, in their answer, admitted the sale of the land and the execution of the covenant, and also admitted that the plaintiffs in this action, under the judgment in the suit against them by the Watlingtons, had been dispossessed of the part of the land described in the complaint, but averred that they had not been damaged thereby, and further, that at the time they purchased the land and received the deed therefor the plaintiffs had full notice that the Watlingtons claimed a part of the land, and were advised not to buy the same. In an amendment to the answer they aver that the judgment in the former suit, when construed in connection with the map annexed thereto, does not include any land conveyed by the deed of the executor, and by reason thereof they plead the judgment as an estoppel upon the plaintiffs.

The judge submitted issues to the jury which, with the answers thereto, are as follows:

1. Did the defendants covenant to warrant and defend the title to the land described in the complaint? Answer: Yes.
2. Were the plaintiffs ousted from the land or any part thereof, as alleged in the complaint? Answer: Yes.
3. What damages, if any, are the plaintiffs entitled to recover for costs and attorneys' fees? Answer: $313.65.
4. What damages, if any, are plaintiffs entitled to recover as the value of the land taken from the plaintiffs? Answer: $135.

The defendants duly excepted to the third issue. Judgment was entered for the total amount of damages assessed by the jury, including attorneys' fees and costs, and the defendants appealed.

John A. Barringer and T. H. Calvert for plaintiffs.
A. L. Brooks for defendants.

WALKER, J., after stating the case: When this case was first presented to us, we thought it would be necessary to decide whether the record in the original suit was evidence against the defendants in this case, either presumptive, *prima facie,* or conclusive, that the plaintiffs had been ousted by a paramount title. It is alleged in the complaint that the plaintiffs in the suit of *Watlington v. Jones* recovered a judgment for a part of the land conveyed by the deed of T. E. Balsley, executor, to

Jones and Taylor, upon a title paramount to that which was conveyed by the deed of T. E. Balsley, executor, and this allegation was not denied. It is true that defendants allege in their answer that the land recovered from Jones and Taylor in the action against them is not a part of the land conveyed to them by Balsley, executor; but that allegation only raises an issue as to the true location of the land, and not as to the superiority of the title of the Watlingtons, if it is embraced by the description in the deed. If the Balsley deed did not convey the land recovered in the other suit, the title is not protected by the covenant of warranty, and the question as to the paramountcy of the Watlington title is not involved. The jury have found, in their response to the first issue, that it is so embraced, for they have decided that the land described in the complaint is covered by the covenant of warranty, and the plaintiffs herein have been ousted therefrom. There was, therefore, no controversy as to the title being paramount to that conveyed by the Balsley deed, but the only question was whether the deed conveyed the land and the warranty protected the title. This fact was found against the defendants' contention, both in that suit and in this. We have not discovered in the case any prayer for instructions or any specific exception or assignment of error which relates to the location of the land or to the effect of the judgment in the original suit, as an estoppel upon the plaintiff in this action to now assert that the deed of T. E. Balsley, executor, covers the land described in the complaint, though it is argued in the brief that they are so estopped, and, in aid of that argument, a map is referred to which is not a part of the record.

The plaintiff, J. W. Jones, testified that the land which he lost in the Watlington suit is a part of the land which was conveyed to him and Taylor by Balsley, and the court seems to have submitted the question as to whether the land which was recovered in the Watlington suit was embraced by the Balsley deed and the covenant of warranty, to the jury, upon the evidence, and they have found that it was included in the description of that deed, and, therefore, covered by the warranty. Nor do we see how the plaintiffs in this action are estopped by the record in the original suit to allege that the three acres recovered in that suit were conveyed by the Balsley deed, and are, therefore, within the protection of the warranty. The Watlingtons recovered the land, we must assume, because they had a valid and superior title. It was sufficient for them to show this in order to recover, and it made no difference whether they recovered because their title was paramount to that claimed by the defendants in that suit under the Balsley deed, or because the land in dispute was not embraced by that deed. They might have recovered on either ground. It was not, therefore, essential that the jury should have found, and the court adjudged, that the land was not so embraced, in order to decide with the Watlingtons; and the location of the land, consequently, was not necessarily involved in that case, even if the plaintiffs in this action (defendants in that one) would be estopped, as contended by the defendants, if it had been so involved. The defendants in this action have not denied the allegation that the Watlingtons recovered under a paramount title, but have merely averred that the three acres are not covered by the warranty. We may add that there is really no question in the case as to the superiority of the Watlington title, if the three acres are covered by the Balsley deed.

The first prayer of the defendants, namely, "If the jury believe the evidence, the plaintiffs are not entitled to recover," has frequently been condemned by this Court as not being a proper one, and may be disregarded when the case is tried upon specific issues framed to ascertain the facts. *Farrell v. R. R.,* 102 N. C., 390; *Baker v. Brem,* 103 N. C., 72; Clark's Code (3 Ed.), sec. 413, p. 535, and notes.

The other assignments of error which it is necessary to consider relate to the allowance of attorneys' fees paid and costs taxed and recovered in the other suit as part of the damages.

There seems to be great conflict in the authorities as to the legal effect of a judgment recovered against a covenantee, as evidence against his covenantor, in an action upon the warranty, both as to the title and the damages. Rawle, in his excellent treatise on "Covenants for Title" (5 Ed.), sec. 125 and p. 164, states the rules, which, he says, have been adopted by a majority of the courts, as follows:

"In reviewing, then, what has been said on the subject of notice to the covenantor of the adverse proceedings, the following points appear to be settled by the weight of authority:

"First. The notice must be distinct and unequivocal, and expressly require the party bound by the covenant to appear and defend the adverse suit.

"Secondly. If such notice appear upon the record of that suit or if the covenantor be made a party to it, the court will, in the action on the covenant, be authorized to instruct the jury that the recovery is conclusive upon and binds the defendant in that action.

"Thirdly. If the notice do not thus appear on the record, the question of conclusiveness of the judgment will depend upon the belief of the jury as to the reception of the notice.

"Fourthly. If the record of the adverse suit does not exhibit on its face the title under which the recovery was had, the plaintiff in the action on the covenant must, notwithstanding proper notice has been given, prove that such title did not accrue subsequently to the deed to himself.

"Fifthly. If no notice has been given, the record of such adverse suit is not even *prima facie* evidence that the title was a paramount one, though it may under some circumstances be evidence of eviction; and

"Sixthly. It is not indispensable to the recovery on the covenant that notice of the adverse suit shall have been in any way given."

This Court, in *Martin v. Cowles*, 19 N. C., 101, approved in *Wilder v. Ireland*, 53 N. C., 85, held that a judgment in ejectment against the vendee is no evidence of a defect in the title of the vendor, when the latter is sued upon his covenant by the former, and *Chief Justice Pearson* says, in *Wilder v. Ireland*, that such is the settled law of this State. See *Miller v. Pitts*, 152 N. C., 629.

We need not attempt to reconcile the conflicting authorities, for it is enough for us to decide in this case, as we do, that the notice given to the defendants as to the pendency of the Watlington suit was sufficient in law to charge them with all the costs and reasonable attorney's fee in assessing the damages. We have referred to the foregoing rules for the purpose of showing what should be substantially the form of the notice, as it is said that the right to recover costs and counsel fees depends upon the character of the notice given by the covenantee to the covenantor of the suit in ejectment against him. After reviewing the authorities, the following conclusion was reached by Mr. Rawle and stated in his work on Covenants for Title (5 Ed.), sec. 201, p. 290: "A consideration of these rather conflicting cases would seem to suggest, as a rule to be deduced from them, that the plaintiff's right to recover counsel fees as part of his costs should, in general, be limited to cases where he has properly notified the party bound by the covenant to come in and defend the title, but that the neglect or silence of the latter should inure to the benefit of the plaintiff rather than to his own." *Chesnut v. Tyson,* 105 Ala., 163; *Wiggins v. Pender,* 132 N. C., 628; *Chrisfield v. Storr,* 36 Md., 129; *Somers v. Schmidt,* 24 Wis., 417 (1 Am. Rep., 191).

The notice given by the plaintiffs to the defendants of the other suit, while there was no express "tender of the defense," as it is called, was quite sufficient to warn the defendant that he was expected to assist in the defense of the suit, nor does it show that the plaintiff intended to exclude the defendants from participation therein. Why notify the defendants at all, if they did not expect them to comply with their covenant and defend the title, which they had expressly promised to do? The notice clearly implied that the plaintiffs in this suit looked to the defendants to protect them in the other suit by defending the same and making good their assertion of title to the land. It is not required that the notice shall be in any particular form or in writing, if it sufficiently, though only substantially, informs the warrantor that his covenantee has been sued and his title has been assailed, and the former has the opportunity to defend his title against attack and to save himself from liability upon his warranty. The true doctrine is stated in *Carroll v. Nodine,* 41 Oregon, 412, as follows: "But before an indemnitor can be expected to defend, he must have reasonable notice of the pendency of the suit or action by which he is to be bound, and afforded an opportunity to participate in or interpose such defense as he may desire; and it is only by complying with such conditions that the party to be indemnified can estop the indemnitor to controvert the matter anew upon an action against him upon the indemnity contract or obligation. Of course, the suit or action that works the estoppel must have been prosecuted without collusion or fraud, as it affects the indemnitor. While notice of the pendency of the suit or action is always necessary to render the decree or judgment binding upon the indemnitor, the better reason and the weight of authority dispense with any request to take charge of or assume the responsibilities of the defense. Having notice, the indemnitor may, as is his right, interpose and make such defense as to him might seem most expedient and effective; and, if he did nothing in that direction, it must be considered a matter of his own volition, and a request for him, coupled with a warning of consequences, to do that which duty and interest require him to do, would seem superfluous, and the law, which is founded upon reason, does not require a vain thing." If the covenantor fails to appear and defend, the covenantee must, of course, be required to conduct the defense in good faith and with reasonable diligence. The judgment must not have been recovered against him by reason of any neglect or default on his part.

We think the notice given by the plaintiff was equivalent, in law, to a notice to defend, as a request to do so is fairly to be implied. When the plaintiffs stated that they would defend the suit, it was not meant that the defendants should not have full opportunity to do so, if they desired; but the contrary is the reasonable implication. It is more just to say that they intended to inform the defendants that if they did not defend, the plaintiffs would defend for them, and not merely for themselves. This accords with what was said in *Wiggins v. Pender, supra*, as we hold that the notice is substantially one which "tenders the defense."

The object of notice is to give the covenantor an opportunity to defend his title in his own way and with his own counsel, and to settle the case and pay the damages by yielding to the superior title, if his is found to be wanting, and thereby save unnecessary costs and expenses.

We do not think this decision necessarily conflicts with *Martin v. Cowles, supra,* and *Wilder v. Ireland, supra.* Each of them was decided upon the question whether the judgment in the ejectment suit was conclusive as to the title, under the system of pleading, practice, and procedure prevailing at common law, when the ejectment suit was regarded with respect to the covenantor as *res inter alios acta,* and he could not, for that reason, become a party to it. The great weight of authority in England and this country is to the effect that it is sufficient to conclude him by the judgment that he is made constructively a party by substantial notice to come in and defend his title, and that it is not necessary that he be actually a party to the suit. In *Martin v. Cowles,* 19 N. C., at p. 102, *Judge Gaston* says that the record in the ejectment suit is, as to the covenantor, "evidence of the fact of the judgment (*rem ipsam*), and of the damages and costs recovered"—implying, we think, that the covenantee in the action upon the covenant is only required to show that the title of the plaintiff, who recovered against him, was paramount, and if he does so, he is entitled to recover the damages he paid in the other suit and the costs taxed, and, we add, reasonable counsel fees, as part of his legitimate expenses.

The covenantor agreed by his warranty to defend the suit, and if he failed to do so, there is no reason why, if properly notified of the suit, he should not pay the covenantee what he would have paid himself if he had complied with his promise and defended his title. Where there is a breach of duty, whether that duty be imposed by contract or by the law, the party who commits the breach should be required to repair the loss caused thereby and which naturally flows from the breach in the case of tort (*Johnson v. R. R.,* 140 N. C., 574), and such loss in the case of contract as was within the reasonable contemplation of the parties. (*Williams v. Tel. Co.,* 136 N. C., 82.) If the covenantee is required by the inaction of his covenantor to defend the ejectment suit, it will be admitted, we think, that it must have been within the reasonable expectation of the parties that counsel would have to be paid by him, as they are ordinarily and generally retained in such cases. It seems to be implied in *Gastonia v. Engineering Co.*, 131 N. C., 363, that counsel fees would have been allowed in that case if the suit against the town had been covered by the indemnity bond. The fees must be reasonable, and because the court instructed the jury that the plaintiffs were entitled to recover the fees they actually paid to counsel, without regard to their reasonableness, there was error, as this was not the proper rule, and for this error there must be a new trial as to the third issue. There was no objection to the amount of the damages assessed under the fourth issue, and there was no question properly raised as to the title, and the jury have found as a fact that the three acres were conveyed by the Balsley deed, and, therefore, covered by the warranty. Nor was there any controversy as to the ouster under the judgment in the Watlington suit. The plaintiff is entitled to recover the costs taxed in that case. The only error was as to counsel fees; but as they are blended with the costs in the third issue, that issue must be tried anew. *Rowe v. Lumber Co.*, 133 N. C., 433.

Before taking leave of the case, we should say that the text-writers state that the rule, as declared in *Martin v. Cowles*, *supra*, and approved in *Wilder v. Ireland*, *supra*, as to the effect of a judgment, in an ejectment suit against the covenantor, as proof of title in an action on the covenant, has been adopted in this State only. In Rawle on Covenants for Title (5 Ed.), p. 153, note 1, it is said that, "In North Carolina alone (unless the decisions are based upon some local usage, for the common law has in none of our States been more clearly understood or expounded) does a contrary opinion seem to prevail," and that it is contrary to the rule accepted by all other courts and the text-writers.

As counsel fees paid in the ejectment suit were fairly within the contemplation of the parties as a part of the damages which the plaintiffs would sustain by the breach of the covenant, we think they are covered by the prayer of the complaint without any more special reference to them. It was as probable that the plaintiffs would have to pay counsel fees in that case as it was that they would be compelled to pay costs and damages.

There must be a new trial as to the third issue.

New trial.

W. D. BAILEY v. MEADOWS COMPANY AND THE CAROLINA, CLINCHFIELD AND OHIO RAILROAD.

(Filed 20 December, 1910.)

1. **Master and Servant—Safe Appliances—Requirements.**
   The master is not required to adopt every new appliance for the safety of the servant as soon as it is known, but he is answerable in damages to the servant for an injury received through his failure to furnish proper appliances that are in general use to do dangerous work.
2. **Same—Evidence Sufficient.**
   The servant was employed to load rails on a car, and was injured while turning one of them after it had been placed on the car. There was evidence tending to show that three railroad companies furnished a certain kind of tongs for this purpose, and had one been furnished the plaintiff the injury would not have occurred: *Held,* evidence sufficient to go to the jury as to the master's liability in failing to furnish a proper appliance to the servant.

PETITION to rehear this case, reported 152 N. C., 603.

Pless & Winborne for plaintiff.
Hudgins, Watson & Johnston for defendants.

BROWN, J. When this cause was considered at last term, we held that upon the evidence no liability attached to either defendant, for the reasons stated in the opinion. As the plaintiff was not the employee of the railroad company, whose road was in course of construction by Meadows & Co., contractors, we see no reason to reverse our judgment of last term as to the defendant, the C. C. and O. Railway Company.

But our attention has been called upon the rehearing to evidence tending to prove that Meadows & Co. failed to furnish the proper implements for handling the large steel rails, and that such failure was the proximate cause of the injury.

Although that point is not discussed in the opinion, it was considered by the Court, and we then thought that there was not sufficient evidence that there were such implements in general use.

Upon a review of the record, and considering the evidence now more specifically pointed out, we are of opinion that there was sufficient evidence to go to the jury upon that feature of the case.

That it is the duty of the master to furnish the servant proper appliances to do dangerous work, if there are such in general use, is well settled. *Orr v. Tel. Co.,* 130 N. C., 627. This negligence of the master "consists in his failure to adopt and use all approved appliances which are in general use and necessary to the safety of the employees in the performance of their duties." *Marks v. Cotton Mills,* 135 N. C., 290. The master is not required to adopt every new appliance as soon as it is known.

It is now claimed that there is evidence sufficient to go to the jury that there were tongs used for the purpose of handling such rails, and which if furnished by Meadows & Co. on the occasion plaintiff's hands and fingers were mashed would have prevented the injury. Upon a more careful examination and consideration of the evidence, we are now of that opinion.

The witness McGaillard testified that he had seen rails loaded on cars and had worked in constructing railroads; that "we laid the rails on the car first like this boy told you, and then we had tongs to place them with"; that he had seen such tongs in use on the Southern Railway, the Tennessee Central, and the Harriman.

It is in evidence that the plaintiff was hurt after the rails were loaded on the car and in turning a rail so as to place it in proper position, and it is a fair inference that had he been supplied with the tongs referred to, plaintiff would not have been hurt. It is not necessary that the plaintiff should prove that such tongs are used on every railroad, but the fact that they are in use on three railway systems is sufficient evidence to justify a jury in finding that they were in general use.

The petition is allowed as to the defendant the Meadows Company and dismissed as to the C. C. and O. Railway. As to the Meadows Company, the judgment of the Superior Court is affirmed.

Let all the costs of this Court, as well as of the Superior Court, be taxed against the defendant Meadows Company.

G. W. CRAWFORD v. TOWN OF MARION AND H. W. DYSART ET AL., ALDERMEN THEREOF.

(Filed 20 December, 1910.)

1. **Cities and Towns—Ordinance—Nuisance—Alleyway—Access to Property—Procedure.**

   The defendant town, by an ordinance criminal in its nature, declared plaintiff's alleyway a nuisance and dangerous to the public, and closed it up. Plaintiff brings his action for damages and mandamus and injunction, on the ground that he had been deprived of access to his property: *Held,* the action was not to enjoin the enforcement of the criminal law, but to determine and enforce plaintiff's property rights, leaving open to the defendant the right to prosecute him under the ordinance.

2. **Cities and Towns—Streets—Adjoining Owner—Access—Injunction—Damages—Procedure.**

   The right of ingress and egress over one's own land to and from a public street is an incident to ownership and constitutes a property right; and an injunction will lie against a town to prevent its depriving an abutting owner to a street of access to his land, and may be joined in the same action with demand for damages.

3. **Cities and Towns—Streets—Adjoining Owner — Access — Procedure.**

   It appears in this case that the plaintiff has been provided with a temporary entrance to his land, and a temporary order restraining the defendant from closing the one complained of is unnecessary and will not be granted. If it should be finally deter-

mined that the alleyway, the subject of the action, is dangerous to the public, or a nuisance, the court will consider the best means of abating or remedying it.

CIVIL action pending in the Superior Court of McDOWELL County, and heard at chambers on 28 October, 1910, before his Honor, *Webb, J.*, upon motion for a restraining order until the final hearing to prevent the defendants from closing up and obstructing an alleyway leading into plaintiff's property, whereby he has ingress and egress to the public street of the town of Marion. His Honor made this order:

"It appearing from said affidavits that questions of fact arise as to whether or not plaintiff has sustained or is now sustaining injury by reason of the closing up of said alleyway by the said town of Marion, and the court being of the opinion that a writ of mandamus should not be issued, nor restraining order be issued until such facts as arise upon the affidavits are passed upon by a jury, it is, therefore, ordered by the court that a writ of mandamus asked for by the plaintiff be not granted at this time, and that a request for restraining order be also refused at this time. It is further ordered by the court, that this cause be stated upon the trial docket of the Superior Court of McDowell County, to be tried at the next term of said court, or such action be taken as the judge presiding may think legal and advisable."

The plaintiff appealed.

McCall & Lisenbee and W. T. Morgan for plaintiff.
Hudgins, Watson & Johnston for defendants.

BROWN, J. It was contended upon the argument that this action cannot be maintained and should be dismissed, as its sole purpose is to prohibit by injunction the prosecution of the plaintiff under an ordinance of the town, criminal in its nature, and that the principle settled by the cases of *Wardens v. Comrs.*, 109 N. C., 21; *Cohen v. Comrs.*, 77 N. C., 2, and *Paul v. Washington*, 134 N. C., 379, applies.

We recognize and reaffirm the authority of those cases in holding that a court of equity will not enjoin the enforcement of a criminal ordinance or statute, but will leave the party to make his defense at law when he is arrested and charged with the crime. But this action does not seek to enjoin the enforcement of the criminal law, as was the case in the cases cited. If the authorities charged with its enforcement think that plaintiff has violated the criminal law, they have the right to prosecute him in the criminal courts, notwithstanding the pendency of this action, which is brought solely for the purpose of determining and enforcing certain property rights of the plaintiff, and in this respect the case differs essentially from those cited.

The plaintiff alleges that he is the owner of a lot upon which is a hotel; that he left open a nine-foot alleyway leading from the rear of his lot and on his own land into the street; that it is the only means of ingress and egress he has, and that it has been in constant use for twenty years; that the defendants have wrongfully and unlawfully closed it up by building a cement sidewalk in front of it of such height and character that he cannot cross it with his vehicles, etc.

The defendants admit that they have closed up the alleyway by the sidewalk aforesaid, but aver that they did so because it was so situated as to be a nuisance and dangerous to the public; they aver that they have provided plaintiff with an entrance on the other side of his hotel and between that and an adjoining hotel, about four feet of which new entrance is on plaintiff's land.

The fact that the defendants enacted an ordinance prohibiting citizens generally from driving across this sidewalk at that and two other similar places does not take from plaintiff the right to test in a civil action his property rights and have removed the physical obstruction to their enjoyment, as well as to recover damages for their infraction.

The remedy by injunction is appropriate to the abutter in a proper case. It will lie to prevent the deprivation of his right of access (Elliott Roads and Streets, sec. 709; *Carter v. Chicago,* 57 Ill., 283; *Callaman v. Gilman,* 107 N. Y., 361), and may be joined in the same action with a demand for damages. *Ross v. Thompson,* 78 Ind., 99. The right of ingress and egress over one's own land to the public streets and roads is an incident to ownership and constitutes a property right.

In *Metcalf v. Boston,* 158 Mass., 285, the Court, speaking of the rights of lot-owners abutting on the streets, says: "They have a right to make for themselves driveways to the wrought part of the street in any reasonable way which does not interfere with the use of the street by the public." The Supreme Court of Indiana treats the right of access as a property right and holds that an injunction will lie to protect it. *Ross v. Thompson,* 78 Ind., 91.

For these reasons, we think that the complaint does state a cause of action independent of any question concerning the administration of the criminal law. But inasmuch as it appears from the record that the plaintiff has been provided with at least a temporary entrance, a few feet of which is on his own land, we see no reason why a temporary restraining order is now necessary.

When the issues raised by the pleadings are passed upon and the rights of the plaintiff determined, an injunction may or may not be necessary; or in case the jury should find that the alleyway in question constituted a nuisance and was dangerous to the public, the court will consider the best means of abating or remedying it, as was done in *Hyatt v. Myers,* 73 N. C., 233, and *Hickory v. R. R.,* 143 N. C., 454. The order denying the temporary restraining order is

Affirmed.

WEAVER POWER COMPANY v. ELK MOUNTAIN MILL COMPANY.

(Filed 20 December, 1910.)

Corporations—Preferred Stock—Debtor and Creditor—Assets—Prorate.

The issuance of preferred stock by a corporation does not create the relation of creditor and debtor between the owner thereof and the corporation so as to entitle him to prorate with the creditors in the assets of an insolvent corporation in the hands of a receiver.

APPEAL from *Councill, J.*, at October Term, 1910, of BUNCOMBE.

This is a petition in the cause (a proceeding commenced for the purpose of winding up the affairs of the Elk Mountain Company, an insolvent corporation) filed by Mary A. Stewart to have certain certificates set out in the record declared a debt against the corporation, to the end that she may share *pro rata* with creditors in its assets. His Honor sustained a demurrer to the petition, and defendant appealed.

J. D. Murphy for petitioner, appellant.
Bourne, Parker & Morrison for receiver, appellee.

BROWN, J. The certificates set out in the record are substantially in the usual form for preferred shares of stock in a corporation, issued by authority of our statute, Rev., sec. 1159, which authorizes corporations to issue two or more kinds of stock of such classes, with such designations, preferences, and voting powers, or restrictions or qualifications thereof, as shall be presented by those holding two-thirds of the capital stock outstanding.

At one time it was a matter of discussion as to whether a preferred stockholder had any rights as a creditor of the corporation or could properly be classified as such. But the law is now clearly settled and beyond dispute that a preferred stockholder is not a creditor, and must be confined to his rights as a stockholder. Cook on Corp. (6 Ed.), sec. 217, where the cases are fully collected in the notes. *Field v. Lamson,* 27 L. R. A., 136, and notes; *Warren v. King,* 108 U. S., 389; 2 Thompson on Corp., secs. 2278 *et seq.;* 1 Machen on Modern Corp., secs. 540 to 548.

The difference between a creditor and a preferred stockholder is well stated by *Judge Lurton,* now of the United States Supreme Court, in *Hamlin v. R. R.,* 78 Fed., 664. "There is a wide difference," says the learned judge, "between the relation of a creditor and a stockholder to the corporate property. One cannot well be a creditor, as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. *Warren v. King,* 108 U. S., 389, 2 Sup. Ct., 789; Cook Stock, Stockholders and Corp. Law (3 Ed.), sec. 271. The chance of gain throws on the stockholders, as respects creditors, the entire risk of the loss of his contribution to capital. He cannot be both a creditor and debtor by virtue of his ownership of stock. If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby. Cook Stock, Stockholders and Corp. Law (2 Ed.), 271; *Chaffee v. R. R.,* 55 Vt., 110; *McCutcheon v. Capsule Co.,* 19 C. C. A., 108-115, 71 Fed., 787; *Morrow v. Steel Co.,* 87 Tenn., 262, 10 S. W., 495. If that was the purpose of this arrangement, most doubtful language was employed. There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for. The violation of this well understood principle is a breach of trust, and a creditor affected thereby may pursue the stockholders, and recover as for an unlawful diversion of assets."

It is true that in the petitioner's certificates of stock it is provided that they "shall be a preferred lien on the assets of the company." But those words are to be construed along with the entire instrument, and it is manifest from the whole paper that the corporation never intended to place the petitioner in the position of a creditor, but only to give her, and like stockholders, a preferred lien on the assets of the corporation when in liquidation over the common stockholders.

The judgment of the Superior Court is
Affirmed.

BREVARD LAND AND TIMBER COMPANY v. C. S. KINSLAND.

(Filed 20 December, 1910.)

1. **Courts—Treaties—Grants—Official Boundaries—Judicial Notice—Evidence.**

   The Meigs and Freeman line having been run by the Federal Government in obedience to the treaty power vested in it by the Constitution of the United States, and expressly recognized by the Legislature of this State, the courts will take judicial notice of its existence; but its physical location is the subject-matter of proof.

2. **Deeds and Conveyances—State Grants—Official Boundaries—Evidence Insufficient.**

   The plaintiff deraigns his title to the *locus in quo* from a grant from the State, and the question presented is whether it is situated on the west of the Meigs and Freeman line, where the lands are reserved to the Cherokee Indians under a treaty with the Federal Government, or east thereof. Defendant introduced evidence by a witness that eighty years after the running of the Meigs and Freeman line he was an employee of the Government, and that the true meridian line was used by the Government, which in the case at bar would sustain defendant's contention. On the line contended for by plaintiff was discovered marked trees and natural objects indicating a very old marking, but none on that contended for by defendant: *Held*, there was insufficient evidence to sustain the jury's finding for defendant, and a new trial is ordered.

APPEAL from *Justice, J.*, at April Term, 1910, of TRANSYLVANIA.

This is an ejectment to try the title to the tract of land described in the complaint and for its possession, and damages for the trespass thereon. The usual issues were submitted, and the jury found that the plaintiff was not the owner and entitled to the possession of the land described. In deraigning its title, the plaintiff offered Grant No. 230 from the State to George Latimer, dated 20 July, 1796, and connected itself with it by mesne conveyances. The defendant rested his defense upon the location of the Meigs and Freeman line, surveyed in 1802 to mark the boundary of the lands reserved to the Indians under the acts of 1788 and 1783. The trial turned upon whether the land claimed by plaintiff lay on the east or west side of that line; if west of that line, the defendant's contention was that the Latimer grant was void, as the land was not grantable; if any part of the grant lay east of that line, then the plaintiff was entitled to recover, as the evidence tended to show the trespass was committed east of that line, if it was located as contended by plaintiff. There was judgment for the defendant upon the verdict, and plaintiff appealed.

W. W. Zachary and D. L. English for plaintiff.

Welch Galloway, Aycock & Winston, and Joseph B. Cheshire, Jr., for defendant.

MANNING, J. The decisive question presented by this appeal is the proper location of the divisional line, marking the eastern limit of the lands reserved for the Cherokee Indians in the State of North Carolina, under treaties made between the United States and the Cherokee Nation. The line is known as the Meigs and Freeman line, Meigs being a commissioner appointed by the Federal Government under the terms of the treaty with the Indians, and Freeman being the surveyor, and was run and marked in the year 1802. This line was recognized and accepted by the State of North Carolina at the session of the General Assembly in 1809, ch. 774, 2 Potter's Compilation of the Laws of North Carolina. It is therein enacted "that the land lying west of the line run by Meigs and Freeman, within the bounds of this State, shall not be subject to be entered," etc. This line having been run in obedience to the treaty power vested by the Constitution of the United States in the Federal Government, and the Legislature of this State having expressly recognized it and the fact that it was so run, the courts must take judicial notice of its existence (*Furniture Co. v. Express Co.,* 144 N. C., 639; *S. v. R. R.,* 141 N. C., 846); but its physical location must remain the subject-matter of proof. The great advantage of its uniform actual physical location, of course, is obvious, as a large number of titles are determinable by it. From the best information obtainable, it follows as near a direct line as the very uneven topography of the country through which it passes will admit. Its termini are very well established, one being where Hawkins' line crosses the Smoky Mountains, and the other being at or near Ellicott's Rock on the dividing line between North and South Carolina. The evidence offered at the trial so located the line.

Assuming, as we must from the records accessible to us and considered by this Court in *Brown v. Brown,* 103 N. C., 213; *s. c.,* on rehearing, 103 N. C., 221, and *Brown v. Brown,* 106 N. C., 451, that the line called the Meigs and Freeman line was actually surveyed and marked, the only evidence offered at the trial of sufficient probative force to be submitted to the jury was of its location as contended by the plaintiff. Along this line was discovered marked trees and natural objects indicating a very old marking. The testimony of an employee of the Government that during the years 1881 and 1885, when the witness was in the service of the Government, the true meridian line was used by the Government, and that, running by the true meridian, the Meigs and Freeman line, the course called for would be located as contended by the defendant, can have no probative force when it is not shown that such was the method employed about eighty years theretofore. Along the line thus run there was no evidence of marked objects. We deem it unnecessary to rehearse the treaties and legislation resulting in the location of the divisional line, as these have been fully considered in cases cited, and in the case of *Latimer v. Poteet,* 14 Peters, 4. Locating the Meigs and Freeman line as contended by the plaintiff, the land upon which the trespass, as alleged in the complaint, was committed, was unquestionably the subject of entry and grant by the State on 20 July, 1796, as it lay east of said line.

His Honor should have given, at least in substance, the tenth special instruction requested by ,the plaintiff; and his refusal to do so constitutes reversible error. Having reached this conclusion, we deem it unnecessary to consider the other exceptions so ably argued before us. The plaintiff is, therefore, entitled to a new trial, and it is so ordered.

New trial.

ALLEN J. WITHRELL v. WILLIAM MURPHY AND GEORGE MOON.

(Filed 20 December, 1910.)

1. **Deeds and Conveyances—Invalid Registration—Title.**

The registration of a deed not duly proved is ineffectual to pass title to lands against creditors and purchasers.

2. **Deeds and Conveyances—Seal.**

Where a corporate act must be executed by an instrument under seal and the corporation had adopted a common seal, the corporation speaks through and by its seal.

3. **Same—Corporate Act—Evidence—Interpretation of Statutes.**

When it does not appear from the probate of a corporation's deed to lands that the seal affixed is the common seal of the corporation or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with Revisal, sec. 1005, and the deed is ineffectual to pass title to the lands as against creditors and purchasers.

4. **Same—Official Acts.**

A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such.

5. **Corporations—Receivers—Status of Property—Interpretation of Statutes.**

Upon the appointment of a receiver of an insolvent corporation, all the real and personal property, etc., wherever situated, vests in the receiver (Revisal, sec. 1224), "impressed with all existing rights and equities, and the relative rank of claims and standing of liens remains unaffected by the receivership."

APPEAL from *Councill, J.,* at Spring Term, 1910, of YANCEY.

This was an action brought to try the title to certain tracts of land described in the complaint, for possession thereof and for the annual rental value. The defendant disclaimed any title to or interest in tract 2 described in the complaint. The questions involved are presented upon agreed facts, as follows:

"It is agreed by both plaintiff and defendants that they hold under a common source, to wit, the National Graphite Company. The plaintiff's first chain of title from the National Graphite Company is a deed of trust from the National Graphite Company to George N. Stone, trustee, dated November, 1903, a copy of which is hereto attached and marked 'Exhibit A.'"

To which the defendant in apt time objected, on the ground that the same had not been sufficiently proven, probated and registered in the county of Yancey.

The plaintiff then offered a deed dated 13 January, 1909, from George N. Woodley, successor in trust of Allen J. Withrell, the plaintiff, a copy of which is hereto attached and marked "Exhibit B" and made a part of the facts agreed.

No other advertisement or notice of sale was made other than that provided for in the deed of trust aforesaid, and recited in the deed, "Exhibit B."

It is agreed that the annual rental value of the lands described in the complaint, other than the second tract, is $50 per year.

It is agreed: That the trustee Woodley is a nonresident of North Carolina, and was such at the time of the advertisement and sale of the property under the deed of trust. That the defendants claim title by virtue of and offered in evidence the following: an action instituted in the Circuit Court of the county of St. Joseph, in the State of Indiana, between the stockholders of the said National Graphite Company, alleging the insolvency of the said company and various other matters and things, and praying for the appointment of a receiver to take over its assets and wind up its affairs. That William A. Rutherford was duly appointed receiver for said corporation by said Circuit Court of St. Joseph County, on 30 June, 1905. That thereafter, upon the petition of the said William A. Rutherford, filed in the Superior Court for the county of Yancey, in the State of North Carolina, the said William A. Rutherford was duly appointed ancillary receiver for said court and directed to take into his control all the assets of the said company within the State of North Carolina and to hold and dispose of the same, subject to the order of the said Superior Court for Yancey County. That the said Rutherford thereafter resigned as such receiver, and it being made to appear to the said Superior Court of Yancey County that one A. D. Harris had been appointed in his stead by said Circuit Court for the county of St. Joseph, State of Indiana, the said Harris was, on 26 January, 1906, duly appointed receiver for the said National Graphite Company instead of the said William A. Rutherford, by said Superior Court for the county of Yancey, and fully qualified as such. Said receiver thereafter duly reported to said Superior Court for Yancey County, as assets of said National Graphite Company, the land described in said deed of trust marked "Exhibit A" and hereto attached, other than that part thereof hereinafter described in the deed of D. M. Hampton to George W. Moon. That said receiver, at September Term, 1906, of said Superior Court of Yancey County, duly reported to said court outstanding debts and liabilities of said National Graphite Company as follows: the indebtedness secured by said deed in trust hereto attached and marked "Exhibit A." Indebtedness to James Murphy, of Yancey County, North Carolina, for work and labor performed, $125, and the judgments next hereinafter referred to and set out.

That prior to the appointment of said receiver a judgment in favor of one D. M. Hampton against said National Graphite Company was duly rendered in the Superior Court of Yancey County, and duly docketed in said county, a copy of which said judgment and the complaint on which it was rendered being hereto attached and marked "Exhibit C."

That, also, prior to the appointment of said receiver, a judgment in favor of one W. W. Chapman against said National Graphite Company was duly rendered by said Superior Court for Yancey County, and duly docketed in said county, a copy of which said judgment and the complaint on which the same was rendered being hereto attached and marked "Exhibit D."

That prior to the appointment of said receiver there was also duly rendered and docketed in the office of the Clerk of the Superior Court of Yancey County, in the case of J. H. Chapman v. The National Graphite Company, a judgment, a copy of which is hereto attached and marked "Exhibit E." That said judgment was for services of the plaintiff rendered to said company as night watchman over its property.

That thereafter, by order of the said Superior Court of the county of Yancey, a copy of which said order is hereto attached and marked "Exhibit F," said receiver, A. D. Harris, after advertisement as provided in said order and not otherwise, sold the lands described in said "Exhibit A" other than those described in the said deed of D. M. Hampton to George Moon, at public auction, at the courthouse door in the county of Yancey, at which sale George W. Moon became the last and highest bidder for said lands, at the price of $3,055. That said sale was thereafter duly confirmed by said Superior Court for Yancey County, and said receiver duly executed and delivered to said Moon a deed in fee simple for the land hereinbefore mentioned, dated 30 October, 1907. Said report was duly filed in said Superior Court for Yancey County on 5 September, A. D. 1907, and no exceptions or objections having been made thereto, and the order confirming the sale duly entered at September Term, 1907, of Yancey Superior Court, and that the said deed to the said Moon was duly registered in the county of Yancey on 2 April, A. D. 1910.

It is agreed that none of the trustees mentioned in the deed of trust marked "Exhibit A" were parties to the suit instituted in the Circuit Court of St. Joseph County, in the State of Indiana, or to the ancillary proceedings in the Superior Court for the county of Yancey, and it did not appear and was not shown that any of the bondholders were parties to said suits or proceedings. That the moneys received by said receiver at the sale of said lands were applied under the orders of the said Superior Court for the county of Yancey to the discharge and payment of the indebtedness of the said company in this State, including the judgments hereinbefore mentioned, and the surplus thereof, under order of the court of Yancey County, was forwarded to the said Circuit Court for the county of St. Joseph. It is agreed that two of the bondholders, to wit, Allen J. Withrell and Fred W. Mack, did not receive any portion of the funds arising from the receiver's sale, and it did not appear as to whether or not any other bondholder received any portion of said moneys arising from said sale by the receiver.

It is further agreed that execution duly issued on 1 May, A. D. 1905, prior to the appointment of said receiver, on a judgment in favor of D. M. Hampton hereinbefore mentioned, a copy of which is hereto attached and marked "Exhibit C," and that the Sheriff of Yancey County, pursuant thereto, duly levied on and sold all of that part of the lands described in "Exhibit A" other than that described in the deed hereinbefore mentioned, from A. D. Harris, receiver, to George W. Moon, and that the defendant George W. Moon, by mesne conveyances duly recorded in said county of Yancey, acquired such title in said lands as the purchaser at said execution sale acquired thereto; the land herein referred to being that portion of the land in dispute, described in a certain deed from D. M. Hampton to George W. Moon, registered in the office of Register of Deeds of the county of Yancey, in Book of Deeds 31, at page 495.

That at the sale made by the trustee, pursuant to the power in the deed of trust marked "Exhibit A," the defendant George W. Moon appeared and publicly announced his claim to said land and protested against the sale thereof.

That all of the sales and conveyances and judgments, under which the defendants claim, were made, executed, delivered, and recorded prior to the sale and conveyance by the trustee, pursuant to the power contained in the deed in trust marked "Exhibit A," except the deed of A. D. Harris, receiver, to said

George W. Moon, which was executed and delivered prior to said sale and conveyance, but not recorded until afterward and subsequent to 31 December, 1903.

The deed of trust referred to as "Exhibit A" was objected to for the reason that its execution had not been properly acknowledged. This is as follows:

In witness whereof, the National Graphite Company has caused these presents to be sealed with its corporate seal and to be signed in its name by its president and attested by its secretary; and to evidence his acceptance of the trust hereby created, the said party of the second part has hereunto affixed his hand and seal, the day and year first above written.

[Corporate seal containing National Graphite corporate seal, South Dakota.]

NATIONAL GRAPHITE COMPANY,
By GEO. D. MILES, *President.*

Attest: J. E. NORTON, *Secretary.*

I, Frank E. Bell, notary public within and for the county of Cook and State of Illinois, do hereby certify the above-named George D. Miles, president, and J. E. Norton, secretary, to me known to be president and secretary of the National Graphite Company, appeared before me and duly acknowledged the above to be their signatures, this 21st day of December, A. D. 1903.

FRANK E. BELL,
Notary Public.

The clerk of the court of Yancey County made the following order of registration:

"The foregoing certificate of Frank E. Bell, notary public, Cook County, Ill., with seal attached, is adjudged to be in due form and according to law. Therefore let the same, with this certificate, be registered. Witness my hand and official seal, this 29th day of December, 1903."

The deed was filed for registration on 29 December. Upon the facts agreed, his Honor held that the plaintiff was not entitled to recover, and gave judgment accordingly, from which he appealed to this Court.

Hudgins, Watson & Watson for plaintiff.

J. Bis Ray, Gardner & Gardner and John S. Adams for defendant.

MANNING, J., after stating the case: The right of the plaintiff to recover in this action depends entirely upon the validity of the deed of trust under which he claims title. If, for any cause, that deed was ineffectual to pass the title of the property described therein as against creditors or purchasers, then he must fail in this action and the judgment rendered by his Honor at the trial in the Superior Court must be affirmed. It is well and thoroughly settled by repeated decisions of this Court that "until a deed is proved in the manner prescribed by statute, the public register has no authority to put it on his book; the probate is his warrant, and his only warrant, for doing so." And unless the deed has been duly proved, the registration is ineffectual to pass the title as against creditors and purchasers. *Duke v. Markham,* 105 N. C., 131, and cases cited in the annotated Report.

Section 1005, Revisal, provides that "The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law," and then follow four forms for the probate of corporate deeds. No one of these forms was followed, even in substance, in the probate of the deed of trust in this case. Registration was necessary to give validity to the deed as against creditors or purchasers. Our inquiry, therefore, is, Is the form of probate sufficient in law? An examination of the statutory form of probate prescribed in those cases in which the corporation executing the instrument affixes its common seal will disclose that there is required proof under oath that the seal affixed is the common seal of the corporation, and that it was affixed by an officer of the corporation. The Legislature in these authorized forms seemed to regard that fact essential in each form of probate where the corporation had adopted a common seal. It seemed to recognize the doctrine that where a corporate act must be executed by an instrument under seal and the corporation had adopted a common seal, the corporation spoke through and by its seal, and that the seal did not prove itself. The reason for this requirement was thus stated by the Court of New Jersey in an early case, *Den v. Vreelandt* (1800), 2 Halstead, 352: "On the contrary, the seals of private courts, or private persons, are not evidence of themselves; there must be a proof of their credibility. It cannot be presumed that they are universally known, and consequently they must be attested by the oath of some one acquainted with them." This reason, so well expressed, has lost none of its strength by the lapse of time.

In 1 Enc. L. and P., 963, the following is stated as essentially required to make the probate sufficient: "It must appear from the certificate, when read in connection with the deed, that the person making the acknowledgment was authorized to execute the instrument for the corporation; that he was known, or proved, to the officer to be the corporate official he represented himself to be, and that he acknowledged the instrument to be the act and deed of the corporation." And at p. 964, same volume, it is further stated: "A substantial showing of the requisite facts is all that is required, and where the instrument purports to be the act of the corporation, the certificate will not be held defective because it recites that the person who executed it, in behalf of and under authority from the corporation, acknowledged it to be 'his' act and deed instead of that of the corporation."

In our opinion, this authority states the requisites of a valid probate of a corporate deed as liberally as ought to be sanctioned; any further extension would be easily abused. In the probate of the deed of trust used in this case the corporate officials simply acknowledge their signatures; they do not acknowledge the instrument to be either "the act and deed of the corporation" or "his" act and deed; the acknowledgment of this fact is entirely omitted, as is any proof that the seal affixed is the corporate seal. We have examined all the cases which we could discover by diligent search, in which the sufficiency of the acknowledgment of a corporate deed has been presented, and we have been able to find no case sustaining a probate which did not contain more than the probate attached to the deed of trust in this case. *Bason v. Mining Co.,* 90 N. C., 417; *Heath v. Cotton Mills,* 115 N. C., 202; *Shaffer v. Hahn,* 111 N. C., 1; *Chicago, etc., R. Co. v. Lewis,* 53 Iowa, 101, and cases cited, note 11, p. 965, 1 Enc. L. and P.

It may not be amiss to say that we think the time has well come when the Legislature can, with propriety and safety, strike out in section 1005, Revisal, the words, "but shall not exclude other forms of probate which would be deemed sufficient in law," and thus prescribe statutory forms of probate of corporate deeds. Doubt and uncertainty would be removed, and as corporations have entered so largely into the business of our people, they have become familiar with the forms to be followed to give validity to corporate deeds. After a careful examination of the authorities, we are constrained to hold that the deed of trust, under which the plaintiff claims, was not sufficiently proven to authorize its registration, and, therefore, it must necessarily follow that the deed passed no title and created no lien upon the property therein described as against creditors or purchasers. It is declared by section 1224, Revisal, that "All the real and personal property of an insolvent corporation, wheresoever situated, and all of its franchises, rights, privileges, and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto." But it has been held by this Court, and is a generally accepted doctrine, that "the appointment of a receiver does not divest the property of prior existing liens," but the court, through its receiver, "receives such property impressed with all existing rights and equities, and the relative rank of claims and standing of liens remains unaffected by the receivership." 1 Pomeroy's Equity Jurisprudence, sec. 155; *Pelletier v. Lumber Co.,* 123 N. C., 596; *Bank v. Bank,* 127 N. C., 432; *Fisher v. Bank,* 132 N. C., 769; *Garrison v. Vermont Mills, ante,* 1.

Upon the appointment of the receiver of the National Graphite Company on the ground of insolvency, the real estate of that corporation forthwith vested in him, and as the deed of trust, under which the plaintiff claims, was ineffectual because of its invalid probate to divest the title of the corporation or create a lien thereon, as against creditors and purchasers, it must follow that the deed of the receiver, made pursuant to the orders of the court, was effective to pass the title of the property of the corporation. Having reached this conclusion, it is unnecessary to consider the other questions urged in the argument before us. Some of them have been considered by this Court in the recent case of *Clement v. King,* 152 N. C., 456, and would seem to be decided in that case. In our opinion, therefore, the judgment of his Honor was correct, and it is

Affirmed.

JOHN A. LANE v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 20 December, 1910.)

1. **Instructions—Nonsuit—Evidence, How Considered.**

   Asking a special instruction that "upon all the evidence, if believed, the plaintiff was guilty of contributory negligence as a matter of law, and the jury will answer" the issue in defendant's favor, is equivalent to asking the direction of a nonsuit, and the evidence will be viewed on appeal in the light most favorable for the plaintiff.

2. **Master and Servant—Negligence—Defects—Duty to Repair—Assumption of Risks.**

   An employee whose duty it is to make a second inspection of freight cars before they leave the railroad yards in a train, and to see that the car doors are properly fastened, secured, and in condition, assumes the risks of his employment and cannot recover damages caused by a car door swinging loose and down at one end of the rail at the top, along which the door runs upon wheels, when he is furnished with appliances sufficient to repair a defect at the bottom of the door, readily discernible, and when its repair would have prevented the injury complained of.

3. **Master and Servant—Negligence—Duty of Master—Instructions—Defects.**

   The principle that a master is negligent in not instructing the servant in doing the work he is employed to do, or the custom of the master to furnish books of instruction, has no application when the cause of the injury complained of should have been discerned by ordinary observation, and no skill was required of the servant in making repairs which it was his duty to make with the instrumentalities furnished, and which would have prevented the injury complained of.

APPEAL from *W. J. Adams, J.*, at August Term, 1910, of DAVIDSON.

The plaintiff, in the fourth allegation of his amended complaint, thus details the manner in which he was injured and for which he sues to recover damages: "That on 28 November, 1907, and for some time prior thereto, the plaintiff was employed by the Southern Railway Company as a servant upon defendant's yards in the town of Spencer, for a valuable consideration, and while engaged in such work as a safety-appliance man and inspecting a train of freight cars which had been assembled for the purpose of being carried out over defendant's road, as aforesaid, and which was then standing upon a sidetrack constructed upon defendant's right of way and being used by its lessee, the Southern Railway Company, plaintiff in the course of his services as such servant came to a car in the night-time with the door open, which it was the duty of the plaintiff to close and fasten before allowing the said train to be carried out; when plaintiff endeavored to pull said door shut in the usual way—by catching one hand inside of said door and the other outside and under the bottom of said door—and while endeavoring to pull the said door shut, which was constructed to slide or roll on a track at the top of said door and along the side of said car by means of supports with rollers to carry the weight of the door on said track, and while pulling the door as aforesaid, the back hinge or roller of the door broke loose and allowed the part of the door-shutter which plaintiff was pulling to swing in the direction that plaintiff was pulling, and the supports which had been placed at the bottom of the door to secure the bottom of the door in place and keep it from falling or swinging were gone, and thereby allowed the shutter to catch plaintiff's arm between the edge of said door-shutter and the facing of the door or post at the side of the door, thereby mashing, bruising and mutilating plaintiff's arm in such a way as to cause him to suffer great bodily pain, mental anguish, and permanently injuring said arm, permanently injuring his nervous system, and his general health."

The particular negligent acts are thus stated:

(1) In that said defendant's lessee carelessly and negligently allowed said car to be placed in a train of cars to be carried and transported by the defendant's lessee over its main line of roadbed without having the necessary supports at the bottom of said door to hold it in place, and without examining the hinge or roller at the top of the door, knowing that it would become in a defective condition by being transported without supports to hold the bottom of the door in its proper place.

(2) In that the defendant's lessee failed to supply the necessary supports for the bottom of said door when inspecting and repairing said car when it came upon the yards at Spencer, as it was the custom and was the duty of the defendant's lessee to do.

(3) In that defendant's lessee carelessly and negligently operated said car in a defective and dangerous condition and required plaintiff to close said door while said door was in a defective and dangerous condition; and, in addition thereto, further charged that defendant had failed to properly instruct plaintiff how to perform his duties and to give him a book of rules.

The defendant, denying any and all acts of negligence charged, further alleged:

"That if the plaintiff was injured at all, it was caused entirely by his own acts and conduct; that, as safety-appliance man, it was his duty not only to fasten and seal the doors, but to examine the doors and other parts of the car as to their condition, and if any was out of order to repair same, with the aid of others, if required, or to report same; and defendant alleges that if the said door or any of its hinges or rollers were in any way out of order, which is expressly denied, it was the duty of the said plaintiff to place the door in proper condition by repairing it, calling in the help of others if he could not repair it himself, or to make report of the same at once; and the defendant alleges that if said door or any of its hinges or rollers were out of order, which is denied as aforesaid, that the plaintiff's injury was occasioned by his own neglect of duty, and carelessly or negligently pulling or forcing the door against his arm, and thereby causing any injury which he may have sustained."

The three issues of negligence, contributory negligence, and damages were submitted to the jury, who answered them in favor of plaintiff, and assessed his damages at $1,000. Judgment was rendered for plaintiff, from which defendant appealed to this Court.

E. E. Raper, George W. Garland, and McRary & McRary for plaintiff.

Linn & Linn for defendant.

MANNING, J. But one exception is presented in the record—the refusal of his Honor to give, at the request of the defendant, the following special instruction: "Upon all the evidence, if believed, the plaintiff was guilty of contributory negligence as a matter of law, and the jury will answer the second issue 'Yes.'" In determining the correctness of his Honor's ruling upon this instruction, we must consider the evidence in that view most favorable to the plaintiff, for if his Honor had given the requested instruction, it would have been equivalent to a nonsuit of the plaintiff.

It must be kept in mind that the admitted duties of the plaintiff were to inspect the freight cars grouped into a train, to discover defects that might render their transportation unsafe, and to repair such defects when discovered, or to have the defective car taken from the train of cars. The defendant had, as appears from the evidence, wisely adopted a system of double inspection of freight cars coming to its yards at Spencer, one upon their arrival and the second after they had been grouped into a train for an outbound trip. It was the duty of the plaintiff to make this last inspection. Experience, it seems, had demonstrated to the defendant that in shifting cars on its yards from track to track and making up an outgoing train, some injury might be done to the cars that would interfere with the safe movement of the train, and the second inspection was enforced. The plaintiff being assigned to this duty, he was equipped with the necessary appliances to perform it; boxes containing knuckle-pins, chains, hasps, staples, nails, grab-irons, hammers, shoes, etc., were placed at convenient points on the yards for the use of the inspector and repairer. The plaintiff was also provided with a lantern, specially made for the use of inspectors in their night work.

The plaintiff testified that "When they (the freight cars) came to me, I would look over the train, inspect it to see if the doors were shut or anything broken during the shifting of the train"; again, in answer to a question, he said that he was what is called the safety-appliance man.

The particular manner in which plaintiff was injured is stated in his complaint and testified to by him; it further appears in the evidence that the doors to the freight cars are sliding doors, and "slide or roll on a track at the top of the door and along the side of the car by means of supports, with rollers." This track at the top primarily supports the weight of the door, which varies from 150 to 250 pounds; but it appears and is alleged by the plaintiff that a secondary support for these doors was provided in the shape of two door-guides or "shoes" attached to the side of the cars at the bottom of the doors. While it appears from the evidence that the primary purpose of these door-guides or "shoes" was to prevent the doors from swinging out at the bottom, it also clearly appears from the evidence of plaintiff's witness that their secondary purpose was to support the doors in case anything happened to the primary support, and that these "shoes" were efficient for this secondary purpose. The presence or absence of these "shoes" was easily detected at a glance because of their size and placing, while the condition of the top slide or track was not so easily discovered by the plaintiff. The door of this particular car at which plaintiff was injured was partly open, and it was his duty to close it and to discover and supply any missing appliance or defect in it. It was charged for negligence against the defendant that it did not specifically instruct the plaintiff as to the safe and proper method of shutting these car doors; but the closing of a door is such a simple act that we are unable to say that a grown man of experience in that work should be specifically instructed as to how to do it, any more than it requires a book of instructions or particular directions to be given as to the manner of using a hammer to drive a nail. The plaintiff's evidence showed that the doors were shut by pushing or pulling them shut, and there was no regular or prescribed way—either way was simple. One of the shoes at the bottom of the car door was off, and when plaintiff undertook to pull the door shut, the hinge or roller at the opposite top corner broke or came loose, and the door swung diagonally down and caught plaintiff's arm against the jamb of the door or doorpost. If the missing "shoe" had been replaced by plaintiff before his attempt to close the door, the injury could not have occurred. Plaintiff admits that if he had looked, he could readily have seen that the "shoe" was missing. Mr. Thompson, in his Commentary on Negligence, sec. 4617, states it as an accepted principle: "From the foregoing, it may easily be concluded that an employee assumes the risk of injury from defects in premises, machinery, mechanical contrivances or appliances which he is employed to repair, or which it is his duty in the course of his employment to repair." This is quoted with approval and applied by this Court in the recent case of *White v. Power Co.*, 151 N. C., 356. The application of this principle determines this case, and we think, against the plaintiff.

It will further be observed that the injury to the plaintiff was not caused by the intervening act of any other servant or in any way aided or participated therein by such other servant; it was the plaintiff's own and sole act. This language of *Chief Justice Bleckley* in *Spinning Co. v. Achord*, 84 Ga., 14, states most clearly the controlling principle (this is also quoted in *White v. Power Co., supra*): "While it is the duty of a master to furnish his servant safe machinery for use, he is under no duty to furnish his machinist safe machinery to be repaired, or to keep it safe whilst repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured as the machinist to have sound and safe machinery to be repaired." The important part of plaintiff's duties was to hunt out and discover defects in the car that might interfere with its safe movement, and to repair such as he ought to discover. In our opinion, his Honor should have given the instruction prayed, and in failing to do so there was error, for which a new trial is directed.

New trial.

LASSIE KELLY, ADMINISTRATOR, v. TRIMONT LODGE, No. 249, I. O. O. F.

(Filed 20 December, 1910.)

1. **Insurance Orders—Restrictive Rights—Tribunals—Courts.**
A member of an insurance order is not bound by any agreement or stipulation restricting his rights to recover sick benefits to the determination of the tribunals of the order, and may enforce them in the courts without first resorting to the tribunals thereof.

2. **Insurance Orders—Sick Benefits—Personal Rights—Restrictive Liability—Beneficiaries—Executors and Administrators.**
The member of an insurance order becomes entitled, as a matter of right, to the sick benefits accruing to him under his policy of insurance, and upon his death without having received payment thereof the cause of action against the order survives and is enforcible under Revisal, sec. 415; and when the constitution of the order provides that the "benefits are rights personal to the member, his family and dependent relatives, and are not payable to the legal representatives of a member's estate,' the personal representative of the deceased member may maintain his action against the order to recover the benefits, when there are none who belong to the named classes to take; and the amount recovered will go into the intestate's estate for distribution or disbursement as required by the statute.

APPEAL from *Joseph S. Adams, J.*, at Spring Term, 1910, of MACON.

Civil action tried on appeal from the judgment of a justice of the peace. The intestate of the plaintiff, who died 12 June, 1908, was a member of the defendant lodge, which was duly incorporated by an act of the General Assembly of North Carolina (Private Laws, Extra Session 1908, ch. 25) and was by said act, section 2, declared "capable in law to sue and be sued, to plead and be impleaded, etc.," in all the courts of this State in "all and singular actions or matters or demands whatsoever."

The plaintiff seeks in this action to recover $36 sick benefits, to which her intestate was entitled under the rules and regulations prescribed by the defendant.

The defendant resists recovery upon the following grounds:

(1) That the application of the deceased for membership contained the following stipulation: "If admitted, I hereby promise and agree to abide by the laws, customs, and usages of the order, and especially of this lodge. And I further agree that I will only seek my remedy for all rights on account of such membership in the tribunals of the order"; and that the lodge itself was the customary tribunal to pass upon and to determine the rights of the members; and that it had, after the death of the intestate of the plaintiff, to wit, in August, 1908, refused to pay any sick benefits on the intestate's behalf.

(2) That the constitution of the Grand Lodge, under whose jurisdiction the defendant is declared to be, by an act incorporating it, contains the following:

"SEC. 110. *Not payable to legal representatives.* Benefits are rights personal to the member, his family and dependent relatives, and are not payable to the legal representative of a member's estate."

At the close of the evidence the defendant moved for nonsuit. The following issue was submitted to the jury: "Is the defendant indebted to the plaintiff; and if so, in what sum?" Under the charge of the judge and upon the evidence, the jury answered the issue, "$36." Judgment was rendered accordingly for the plaintiff, and defendant appealed to this Court.

T. J. Johnston and G. L. Jones for plaintiff.

Robertson & Benbow, Perrin Busbee, and T. H. Calvert for defendant.

MANNING, J. It is contended by the defendant that the stipulation contained in the application for membership in the defendant lodge by the deceased, that he would seek the remedy for all his rights on account of such membership in the tribunals of the order, precludes any resort to the established courts of the State for the enforcement of any right, however just or however plainly established by contract, unless the tribunals of the order deliberately refuse to act, or their action is fraudulently taken. The precise question was considered and determined by the Supreme Court of Illinois, in the case of *Ry. Conductors' Benefit Assn. v. Robinson,* 147 Ill., 138 (159), in which case the Court said: "That it is competent for members of societies of this character to so contract that their rights as members shall depend upon the determination of some tribunal of their own choice, may be conceded. But where the designated tribunal is the society itself, one of the parties to the controversy, or, what is substantially the same thing, the board of directors, which is its official and organic representative, the courts will hesitate and even refuse to treat its decisions as final and conclusive, unless the language of the contract is such as to preclude any other construction. The judicial mind is so strongly against the propriety of allowing one of the parties or its especial representative to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to if necessary to avoid the result." In *Pearson v. Anderburg,* 28 Utah, 495, the Supreme Court of Utah, having announced the same conclusion as the Illinois Court, said: "To hold otherwise would be an attempt to clothe such voluntary association with power to create judicial tribunals, which would be contrary to the law of the land. *Daniher v. Grand Lodge A. O. U. W.,* 10 Utah, 110. We, therefore, hold that plaintiff was not required to exhaust the remedy provided by the tribunals of the association as a condition precedent to the bringing of this action. We have no doubt of the power of members of a voluntary association to restrict themselves, as to matters incidental to the operation of the association, to remedies before tribunals created by the association, the nature and kind of which we need not here consider. We are, however, of the opinion that this case does not fall within such rule. The right to the moneys due here was a property right, and was created by and growing out of a contract."

In 2 Bacon on Ben. Soc. and Life Ins., sec. 400a, p. 1016, the learned author, after quoting from many cases, says: "It seems to us that the reasoning of the Supreme Court of Illinois is most logical and in accordance with the principles of justice. It is certainly abhorrent to a sense of justice that a corporation should be judge and jury when defendant, and should decide upon the validity of claims against itself, to the exclusion of the civil courts or any rights on the part of the claimant to have a review by the courts of such judgment."

Limiting the stipulation in the application to an agreement to submit to the decisions of the tribunals of the order upon all questions of a legislative or administrative nature, and to their judgment upon controversies of members with one another within the order, we think the stipulation can be sustained, and we would say that upon a question involving one of the above matters the member had by such stipulation precluded himself from a resort to the court, in the absence of charges of fraud or misconduct. But where the question involved is the enforcement of a property right, such as is presented in this case, we hold that the courts can be invoked by a member to aid him in the enforcement or protection of such rights, without resorting, in the first instance, to the tribunal of the order. The Supreme Court of Maine, in *Stephenson v. Ins. Co.*, 54 Me., 55, thus tersely stated the principle: "The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case than they have to provide a remedy prohibited by law." *Braddy v. Ins. Co.*, 115 N. C., 354. Our Court has uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer. *Mfg. Co. v. Assur. Co.,* 106 N. C., 28.

The second question earnestly urged upon our consideration is that the personal representative of the deceased member cannot maintain the action to recover the sick benefits due the deceased, for the reason that the constitution of the grand lodge provides that the "benefits are rights personal to the member, his family and dependent relatives, and are not payable to the legal representative of a member's estate." There is no evidence found in the record that the deceased member, Kelly, had any "family or dependent relatives," and we will assume that he in fact had none. What, then, becomes of the sick benefits accruing to him in his lifetime, but unpaid, The evidence is sufficient to establish the fact that he was entitled to them under the rules of the lodge, and having a right to them by reason of the contract, it was the obligation of the defendant lodge to pay them and thus perform its contract. These sick benefits were not mere donations or gratuities, such as pensions (*In re Smith,* 130 N. C., 638; *Gill v. Dixon,* 131 N. C., 89); they became payable upon the happening of certain conditions, one of these being that the particular member should be in good standing, and that is explained to mean not in arrears in his fixed dues. Paying his dues, the member, being disabled by sickness not caused by intemperance or immoral conduct, became entitled to these sick benefits as a matter of right. Ought the lodge, by withholding payment until after the death of its sick member, be permitted to hold these sick benefits as forfeited to it or as a derelict cast into its treasury? If forfeited, they became so in its own wrong, by its refusal to perform its own contract. In such event, as is said by the Court of Appeals of New York in the case of *Bishop v. Grand Lodge of Empire Order of Mutual Aid,* 20 N. E., 562: "The neglect of the company might thus result in a forfeiture of the fund. The whole object of the corporation would thus be defeated, and a most unjust result would or might follow such a construction." A section of the act incorporating the defendant in that case provided that such beneficiary fund should be exempt from execution, and not be liable to be seized or taken on any process to pay any debt or liability of a deceased member. In *Pearson v. Anderburg, supra,* the defendants were members of a voluntary association known as and called "Sandy Lodge, No. 11, I. O. O. F., Sandy, Utah," and the plaintiff was the administratrix of a deceased member. In that action the plaintiff sought to recover sick benefits as well as the funeral benefit, and the same defense as in this case was interposed. The Court said: "They were not benefits due or payable to the widow or the family, or benefits due arising after the death of the said deceased. The deceased, had he lived, could have maintained an action therefor. The action did not abate by his death."

In *Md. Mut. Ben. Soc. Red Men v. Clendinen, admr.,* 44 Md., 429, cited by counsel for the defendant, the controlling rule of the society in that case provided that upon the death of a member, a fixed sum should be paid to the widow, child or children, or such person or persons to whom the deceased may have disposed of the same by will or assignment, and in the event that there was no wife, child or children, and no execution of the power of disposal in the manner authorized, then, after the payment of the funeral expenses, the excess should go to the permanent fund of the association. The deceased member, in that case, left no wife, child or children, and did not execute the power of disposal, and the Court, in denying the right of the administrator of the member to recover, said: "The interest acquired by a member of this association is not one payable to himself, or for his own benefit, further than his funeral expenses. It is not a '*debitum in presenti, solvendum in futuro*'; if the deceased had only a power and not an interest or property in the sum or fund, it is not assets." The decision of the Court in *In re William Roddick,* 27 Ont., 537, rests upon the well-recognized principle that the beneficiary named in a certificate of insurance or a policy of insurance, and not the personal representative of the deceased member, is alone competent to maintain an action to recover the amount stipulated to be paid in the policy or certificate. These authorities cited by the defendant's counsel are not decisive of the present question. If the cause of action to recover the sick benefits survived or continued, then by section 415, Revisal, the right of action to enforce it survived. If the deceased member had, during his lifetime, begun action to recover these benefits, it is clear the action would not have abated upon his death, and we think his personal representative would have been the proper party to continue the prosecution of the suit. We do not think this case presents the case of a failure of donees capable of taking; that applies to testamentary devises and to trust estates; but it presents the case of a debtor prescribing the successive persons to whom he will pay the debt due. Where the deceased member leaves a family or dependent relatives, it may be that these sick benefits, when recovered, would be held by the personal representative, not strictly as assets for the payment of debts, but as designed primarily for the benefit of those persons coming in that class; but we think, in those cases as in this, where there are none belonging to the named classes, the benefits, when recovered by the personal representative, will go into the intestate's estate for disbursement or distribution, as required by our statute. In our opinion, the judgment of the court below should be affirmed.

No error.

R. H. LUTHER ET AL. v. SOUTHERN RAILWAY COMPANY.

(Filed 20 December, 1910.)

Clerk of Court—Fees—Cost—Interpretation of Statutes.

The fees for continuances of cases allowed to the clerk of the Superior Court by Revisal, sec. 2773, must be for such continuance as is made by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial.

APPEAL from *Justice, J.*, at February Term, 1910, of BUNCOMBE.

Motion to retax bill of costs adjudged against the defendant. The defendant moved to strike out in the bill of costs the item, "Ten continuances of $3," and as pertinent thereto his Honor found the following facts: "That the case was docketed in this court on 5 August, 1907; that since that time the case has never been reached for trial; that no order continuing the case has ever been made; that the case has never been placed on the calendar for trial; that ten terms of the court have elapsed since the case was docketed." Upon these facts his Honor refused the motion to retax, and adjudged the bill of costs as made out by the clerk to be correct and legal. The defendant appealed.

No counsel for plaintiff.
Moore & Rollins for defendant.

MANNING, J. Section 2773, Revisal, prescribes the fees to be charged by clerks of the Superior Court for official services rendered in the course of actions pending in the Superior Courts, and for the doing of other acts. Among these fees, it is prescribed, "Continuance, 30 cents," and it was for the charge for ten continuances, at 30 cents each, amounting to $3, that defendant objected to in the bill of costs, upon the facts found by his Honor.

We think his Honor should have disallowed the item. There was no motion made by either party to the action for a continuance of the trial of the cause, and no order made by the presiding judge granting such continuance, and no entry of such motion and order by the clerk in the minutes of the court. It is for such services performed upon motion and order that the charge for a continuance is to be allowed, and not upon the state of facts found by his Honor. In *Blount v. Simmons,* 120 N. C., 19, in reviewing a bill of costs, this Court said: "The charge, 'Motion for judgment, 25 cents,' is often made by clerks, but is illegal. The 'motion' for which '25 cents' is allowable is a motion in the cause made in writing and required to be recorded, and not the mere verbal application for a judgment." So in *Guilford v. Comrs.,* 120 N. C., 23, this Court, in again considering the fees of clerks, said: "Code, sec. 86, prescribes that 'the clerk shall keep the papers in each action in a separate roll or bundle, and, at its termination, attach them together, properly labeled, and file them in the order of the date of final judgment.' This is the 'filing papers' for which the clerk is entitled to charge a fee of 10 cents." So the allowance to the clerk of a fee of 30 cents for a continuance must be such a continuance as is made by the judge upon motion, and such as must be recorded in the minutes by the clerk, and not such continuance of the trial of an action as is brought about by the inability to reach the cause for trial, owing to a crowded docket and lack of time. Such a continuance is accomplished solely by act of the law—the law's delay; and it was not contemplated that the clerks should charge the fee of 30 cents for such continuances. His Honor should have allowed the motion of defendant. This item will be stricken from the bill of costs. The ruling of his Honor is, therefore,

Reversed.

ALICE WILSON v. RUFUS WILLS ET AL.

(Filed 20 December, 1910.)

Deeds in Trust—Sale—Partnership—Principal and Agent—Dower—Fraud—Evidence—Nonsuit.

A partnership of three duly executed, with their wives, a deed of trust to F. upon their separate lands to secure a partnership debt, which was foreclosed to pay the debt under its terms and conditions. The lands were bid in by the mortgage creditors, and by them conveyed to one of the firm for the amount of the debt, taking a deed in trust to secure the purchase price. This action is brought by the wife of one of the partners to set aside the conveyances on the ground that the other partners were her agents and acted in fraud of her rights: *Held*, (1) the plaintiff, having duly executed the mortgage to the partnership, conveyed her inchoate right of dower and the purchaser obtained a good and indefeasible title, whether she had paid a part or all of the purchase money for the land embraced in the mortgage, there being no evidence that the sale was not fairly and honestly conducted, or that the terms of the trust deed were not complied with; (2)

it appearing that the plaintiff had full knowledge of the advertisement of the land for sale, with full opportunity to pay the debt or redeem beforehand and before the deed was made to the purchaser, and there being no evidence of fraud, a motion to nonsuit should have been allowed.

APPEAL by plaintiff from *Justice, J.*, at March Term, 1910, of BUNCOMBE.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

Frank Carter and H. C. Chedester for plaintiff.
Jones & Williams and J. D. Murphy for defendants.

CLARK, C. J. Rufus Wills, William A. Greenlee, and George W. Wilson were partners in business, and being indebted to Slayden-Fakes & Co. $1,100, on 20 March, 1900, they executed to B. R. Fakes a promissory note due one year after date, and to secure the payment thereof the said partners and their wives conveyed certain property to S. B. Davis by deed in trust. The partners were not tenants in common of the lands conveyed, but the different tracts belonged to the different partners. The debt not being paid, the lands were sold 23 April, 1903, by the trustee under the terms of the deed in trust, and Slayden-Fakes & Co. became the purchasers. On 25 August, 1903, they conveyed the several tracts to Catherine Wills and to Rufus Wills and to M. A. Greenlee, taking a deed of trust from Wills and wife to secure the purchase money. The consideration expressed in these deeds of trust represent the $1,100 owing from the three partners, Wills, Greenlee, and Wilson, to Slayden-Fakes & Co.

This action is brought to set aside these deeds and deeds of trust on the ground of fraud on the part of Greenlee and Wills, whom the plaintiff, Alice Wilson, claims were her agents. We find no evidence to show fraud on the part of Greenlee, now deceased, and the whole contention of the plaintiff is to prove fraud on the part of Rufus Wills.

It is not contested that the mortgage for $1,100 was for a valid indebtedness, that it was not paid, that the foreclosure was conducted fairly and honestly, and that the sale was made after due advertisement, and without any irregularity in the proceedings. The purchaser at said sale obtained a good and indefeasible title, and had a right to convey the same to Rufus Wills. It can make no difference whether the plaintiff had an inchoate right of dower or whether she had paid a part of the purchase money or all of it. She had joined in the deed of trust of 20 March, 1900.

We think his Honor properly sustained a motion to nonsuit. There is no proof of any fraud, actual or constructive. The evidence is that Alice Wilson knew that the land was advertised for sale. She was so told by one who had seen the advertisement in the newspapers, and who told her she had better make some arrangements about it. She could read and could have gotten the paper for herself. Another witness told her of the advertisement and told her he would let her have the money, and she said that she did not want it, that she had the money. Three or four days after the sale she was told it had taken place. She did not claim that she had not heard of it, but said the sale was a fraud, and she was going to see a lawyer about it. At that time the deeds to Greenlee and Wills had not been executed and they were not executed till 24 August, 1903, four months after the sale. In July Rufus Wills told the plaintiff that Slayden-Fakes & Co. had bought in all three homes to save them, and that all that was needed was for them to go and pay the money and get back the land. Though she said she had the money, she made no effort to do this.

The plaintiff claims that she had conversations with Greenlee and Wills, who were acting as her agents and who promised to take care of her. That she told Wills that she had money to save her land and she wanted him to go and save it for her, and he promised to do it. This is denied by Wills. If the plaintiff's own evidence be taken as true, she furnished no money to Wills, and there was nothing to raise a trust. If a promise of that kind was made, it was without consideration. The deed from the trustee to Slayden-Fakes & Co. is without impeachment. If the deed to Wills was set aside, the grantors could forthwith make a new deed to Wills. Besides, Wills has conveyed the property in a deed of trust to the defendant Murphy, whose title is without impeachment.

Upon a careful examination of the evidence, we think that the judgment of nonsuit should be

Affirmed.

W. A. ROGERS v. GENNETT LUMBER COMPANY.

(Filed 20 December, 1910.)

1. **Reference Agreed—Power of Court—Procedure.**

   The court cannot set aside the method of trial agreed upon by the parties to a consent reference.

2. **Reference Compulsory—Exceptions—Power of Court.**

   When either party to a compulsory reference reserves his right to a jury trial, the judge can set the reference aside and submit the case to the jury upon proper issues.

3. **Same—Issues.**

   The judge is not precluded by the issues formulated by the party excepting to a reference; he should submit the issues properly raised by the pleadings.

4. **Same—Objections and Exceptions.**

   A party who does not except to a reference cannot object that the issues were not restricted to those formulated by the other party. He can except only that the issues actually submitted were not such as are determinative of the controversy raised by the pleadings, and did not permit him to present every phase of the controversy.

5. **Contracts Written—Parol Evidence—Consideration—Statute of Frauds—Debt of Another—Interests in Lands—Contemporaneous Agreement.**

   Plaintiff sold J. certain lands to be paid for at a certain rate per thousand feet of lumber to be cut thereon. The latter sold to defendant, who made a certain cash payment to him in advance, the defendant having no notice that plaintiff owned the land and had reserved a lien on the lumber to secure the purchase price from J. By contracts in writing between plaintiff, defendant, and J., the plaintiff agreed that the payment of the purchase price be made by the defendant from profits made in cutting the lumber at a lower rate per thousand than originally agreed upon with J., which should be paid to plaintiff on the purchase price in behalf of J.: *Held,* evidence was competent to show an oral contract by which defendant was obligated to pay the purchase price for J.; (1) there was a sufficient consideration to support it in the modification of the lien and price per thousand feet of the plaintiff's contract with J., so that defendant could cut the lumber and continue his contract; (2) it was not a promise to answer for the debt of another, Revisal, 974; (3) the agreement was to assume to pay a certain sum of money; it was an executed and not an executory contract to convey an interest in lands required by Revisal, 976, to be written; and, if it had been, the purchaser could not object; (4) it does not alter or contradict the written agreement, but adds a collateral stipulation, and does not appear as having been contemporaneously made.

MANNING, J., dissenting.

APPEAL by defendant from *Joseph S. Adams, J.,* at Spring Term, 1910, of MACON.

The facts are sufficiently stated in the opinion of *Chief Justice Clark.*

J. Frank Ray, Johnston & Horn, and George L. Jones for plaintiff.

Robertson & Benbow and Aycock & Winston for defendant.

CLARK, C. J. When there is a consent reference the court cannot set aside the method of trial agreed upon by the parties. It can affirm, modify, or disapprove the report of the referee or can rerefer the case. When it is a compulsory reference, if either party reserves his right to a jury trial, in the manner pointed out in *Driller Co. v. Worth,* 117 N. C., 515, the judge can set aside the reference and submit the case to the jury upon proper issues. *Brackett v. Gilliam,* 125 N. C., 380; *Cummings v. Swepson,* 124 N. C., 579; *Morisey v. Swinson,* 104 N. C., 560; *Bushee v. Surles,* 79 N. C., 51. While the party excepting to the reference should formulate issues, the court is not concluded by them, but should submit the issues properly arising upon the pleadings. But, certainly, the party who does not except to the reference cannot object that the judge did not restrict himself to the issues formulated by the other party. He can only except if the issues actually submitted are not such issues as are determinative of the controversy raised by the pleadings, and did not permit him to present every phase of the controversy.

In June, 1907, the plaintiff, W. A. Rogers, sold to the defendant J. M. Rogers the right to cut the timber on the plaintiff's tract of land for $2,500, with the stipulation in the contract that $10 should be paid the plaintiff on each 1,000 feet of lumber, at the railroad station before it was shipped, until the $2,500 had been paid. In October, 1907, the defendant J. M. Rogers sold the right to cut said timber to the defendant lumber company, which paid him his $500 cash in advance. The lumber company had no notice that the plaintiff was the owner of the land, and had reserved a lien of $10 per thousand on the lumber. The lumber company finding it impossible to operate under this contract, in November, 1907, a written agreement was made between the plaintiff, W. A. Rogers, and the defendants, J. M. Rogers and the lumber company, whereby W. A. Rogers waived his lien of $10 in consideration that $4 per thousand, instead, should be paid him, to be credited on the $2,500 purchase money, and further, that before the shipment of each car-load of lumber the lumber company should pay to W. A. Rogers the difference between the cost of producing said car-load of lumber and delivering it at the station, and certain stipulated prices which the parties had agreed should be taken as the market value of the different kinds of lumber. On the same day there was an agreement, also in writing, between W. A. Rogers and the lumber company that if the difference between the cost of producing lumber and delivering it at the station and the estimated market value should not amount to the $4 net agreed to be paid W. A. Rogers, there should be an abatement of said $4 to the amount of actual profit. The plaintiff alleged in his complaint that besides the above contracts, which were all in writing, there was a further oral agreement, in consideration of the release of the $10 lien, that the lumber company would be responsible for the payment of the balance due of the $2,500 purchase money for the timber, that it "would protect plaintiff and see that he got his money out of the timber, if he would thus modify the contract for the benefit of the lumber company."

The defendant lumber company excepted to the admission of the evidence of this oral agreement, upon the following grounds:

1. That the agreement was without consideration. But the evidence of the plaintiff, if believed, was that the consideration was the reduction of the lien from $10 to $4 to be paid before the shipment of the lumber, so that the lumber company could continue its operations.

2. The defendants contend that the agreement was void, being an oral agreement to be responsible for the debt of another. Revisal, 974.

Upon that proposition his Honor charged correctly as follows: "If you should find in this case that this debt was owing by J. M. Rogers to the plaintiff, who held a lien or mortgage upon the lumber produced from the timber for the payment of the debt therefor, and that the lumber company, in order to get the lumber released from said lien, promised W. A. Rogers to pay the debt or see that the debt was paid, and by reason of such promise W. A. Rogers did release and discharge it from the mortgage for the benefit of the lumber company, then the statute of frauds is not applicable, and you shall answer the first issue 'Yes.'" *Marrow v. White,* 151 N. C., 96, and cases there cited.

3. It has been suggested that said promise was void because it was an agreement in regard to an interest in land, and should have been in writing. Revisal, 976. But this was an executed and not an executory contract to convey an interest in land. That had already been done in the written contract. Besides, this is not pleaded. This was a stipulation to assume the payment of a certain sum of money. *Taylor v. Russell,* 119 N. C., 32. That case cites *Green v. R. R.,* 77 N. C., 95, and other cases which hold that the promisor to pay money "is at the wrong end of the contract" to object that the agreement is not in writing. This has been cited and affirmed, *Harty v. Harris,*

120 N. C., 410; *McNeill v. Fuller,* 121 N. C., 213; *Bank v. Loughran,* 126 N. C., 818; *Davis v. Martin,* 146 N. C., 281.

4. The defendants further contend that the oral agreement varies or contradicts the written agreement. Aside from the fact that it does not appear that it was contemporaneous with the written agreement of 2 November, 1907, which reduced the payment to $4 per thousand and made other stipulations, it may well be that this oral contract was made prior or subsequent thereto, and therefore was not incorporated into the written agreement. But however that may be, it in nowise alters or contradicts the written agreement, but simply adds thereto a collateral stipulation. *Nissen v. Mining Co.,* 104 N. C., 309, and cases there cited. See, also, cases which have cited *Nissen's case* in the Annotated Ed., and *Brown v. Hobbs,* 147 N. C., 73, in which last the subject has been very fully discussed by *Walker, J.*

No error.

MANNING, J., dissenting.

T. W. CARSWELL v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 20 December, 1910.)

1. **Telegraphs—Office Hours—Waiver.**

   A telegraph company waives its rules as to reasonable office hours by accepting a message for transmission after its office is closed for the night; and when it appears in a suit for damages for delayed delivery of a telegram that it was accepted for delivery "if there was nothing the matter at the other end of the line," and was sent and received by its agent at the point of destination, the provision as to reasonable office hours is waived there, also.

2. **Same—Delayed Delivery—Service Message—Notice to Sender—Negligence.**

   When a telegram is received after office hours by a telegraph company upon condition that it will be delivered at destination "if there was nothing the matter at the other end of the line," and the defense of the company, in an action for damages for delayed delivery, is that delivery could not have been promptly made because it was received at destination after office hours and there was no one by whom to send the message to addressee, the burden is upon the defendant and it is its duty to show that it had notified the sender of the fact; and evidence is insufficient which merely tends to show that a service message was sent back, but not delivered to the sender.

3. **Telegraphs—Negligence—Physician—Mental Anguish—Notice—Damages.**

A telegram sent to a physician reading, "Come at once. My wife very sick," is sufficient to notify a telegraph company that mental anguish will result to the husband from a negligent delay in its delivery; and the husband may recover damages for the delay, caused by the defendant's negligence, in not sooner having the doctor in attendance upon his sick wife.

WALKER, J., concurring; BROWN and MANNING, JJ., dissenting.

APPEAL by defendant from *Webb, J.,* at September Term, 1910, of MCDOWELL.

The facts are sufficiently stated in the opinion of *Chief Justice Clark.*

Pless & Winborne for plaintiff.
Merrick & Barnard for defendant.

CLARK, C. J. On 16 October, 1908, the plaintiff's wife, who had an infant six days old, was suddenly taken worse. The plaintiff asked the defendant's agent at Nebo to send a message to Dr. Brookshire at Bridgewater, 6 miles away. It was a little after 9 o'clock at night. The agent said that he would send it "if there was nothing the matter at the other end of the line." The message read as follows: "Dr. Brookshire, Bridgewater, N. C.: Come at once. My wife very sick. T. W. Carswell."

The plaintiff paid for the message. The message was received by the operator at Bridgewater, but was not delivered till 12 o'clock at night, when the plaintiff himself passed the station at Bridgewater, and the operator came out and handed him the message and asked him to deliver it to Dr. Brookshire. The plaintiff getting no response from Bridgewater, assumed that all was right at that end, and that the message had been received by the operator there (as in fact it had been), and waited for two hours, trusting that the message had been delivered and the doctor would come. But the doctor not arriving, and his wife getting worse, about 11 o'clock he left his wife, who was in such agony that he expected her to die before he returned, and in this great anxiety and mental suffering, he got on his mule and rode down to Bridgewater, where he found the doctor, who immediately returned with him. Dr. Brookshire testified that he was in his office that night from 8 o'clock till 12, when the plaintiff arrived, and would have gone promptly to the plaintiff's wife if he had received the message.

The defendant's operator at Bridgewater testified that he received the message about 9 o'clock, which was after office hours, and that he wired back to the operator at Nebo that he could not deliver it before 11 o'clock. There is no evidence that this message was communicated to the plaintiff. On the contrary, when the plaintiff offered to testify as to what the operator at Nebo told him, the evidence was excluded on the objection of the defendant. The reasonable inference is that he would have testified that the information he received was that the operator at Bridgewater had wired back that he would deliver the message. The plaintiff's conduct corroborates this, for he testifies that he remained for two hours longer waiting for Dr. Brookshire, expecting him to come.

This case is "on all-fours" with *Carter v. Tel. Co.,* 141 N. C., 374, which holds that while the telegraph company can fix reasonable office hours, yet when the operator at the sending office received this message, he waived this regulation; and when the operator at the receiving office took the message, he also waived the office hours regulation, and if he could not deliver the message he should promptly have so wired back. It is true that the operator at Bridgewater did testify that he so wired, but the burden was on the defendant to show that such service message was delivered to the plaintiff, or that without its negligence this could not be done. It is not shown that this service message (if it was sent) was delivered to the plaintiff, and, on the contrary, the plaintiff was not allowed, by reason of defendant's objection, to testify what the agent at Nebo told him, and his conduct shows that he must have been told that the message would be promptly delivered. The undisputed facts are that the company through its operator at Nebo undertook to send the message and received the plaintiff's money; that the operator at Bridgewater took the message, and that the plaintiff received no notice that the message would not be delivered promptly, as he had a right to expect. The tenor of the message put the defendant on notice that mental anguish would likely result to plaintiff if the message was unreasonably delayed, and his testimony is, and the jury so find, that he suffered great mental agony by the delay. The receiving office at Bridgewater held the message from 9 o'clock till 12, and shows no excuse for the delay, in the opinion of the jury.

In *Cogdell v. Tel. Co.,* 135 N. C., 436, the Court said that "It is the duty of the telegraph company to promptly inform the sender of a message when, for any reason, it cannot be delivered," citing *Hendricks v. Tel. Co.,* 126 N. C., 304; *Laudie v. Tel. Co., ib.,* 431; *Bright v. Tel. Co.,* 132 N. C., 324; *Hinson v. Tel. Co.,* 132 N. C., 467; and *Bryan v. Tel. Co.,* 133 N. C., 603, in all of which it had been so held. The same ruling has been made since in *Green v. Tel. Co.,* 136 N. C., 507; in *Carter v. Tel. Co.,* 141 N. C., 378; and in other cases. In *Suttle v. Tel. Co.* the same doctrine is laid down, the Court citing many cases holding that the telegraph company may waive its office hours, and does so if it receives the message at the sending office, and also at the receiving office, if no objection is communicated back to the sender. In *Cates v. Tel. Co.,* 151 N. C., 500, *Walker, J.,* cites and approves *Carter v. Tel. Co.,* 141 N. C., 378, and *Suttle v. Tel. Co.,* 148 N. C., 480, and pertinently says of the operator at the receiving office in *Carter's case:* "His silence was calculated to mislead the sender, who could have procured the early attendance of her physician at her bedside by other means, if he had known of the true situation. That decision was right, and in perfect accord with our decision in this case." In the present case if the defendant company had communicated to the plaintiff that it could not promptly deliver this message, the plaintiff would have gone at once to Bridgewater, without waiting two hours as he did, witnessing the agonies of his wife, and in constant expectation of the appearance of the physician. He testifies that his wife was much worse when he left at 11 o'clock, and that he despaired then of ever seeing her alive again.

There was ample evidence to submit the issues of negligence to the jury. The other exceptions are covered by repeated decisions of this Court, and need no discussion.

No error.

WALKER, J., concurring: I would have nothing to say in this case were it not for the suggestion that the opinion of the Court is in conflict with something that was said in *Cates v. Tel. Co.*, 151 N. C., 497. The two cases are in no respect alike, either in their facts or in the law applicable to them. They are as unlike, it seems to me, as they could possibly be. The words taken from *Cates' case* were quoted from the opinion of the *Chief Justice* in *Carter v. Tel. Co.*, 141 N. C., 374, for the purpose of showing the difference between those two cases and of correcting an erroneous impression as to what had been decided in *Carter's case*. In *Cates' case* the message was received for transmission at 8:25 o'clock P. M., at Haw River, and was sent "subject to delay," the sender having been told that it could not be delivered that night unless the telegraph company and the railroad company had joint offices at High Point, which was not the case. The message was not received at High Point until the next morning, as the office of the defendant at that place had been closed for the night and no connection with it could be made until 8 o'clock the next morning, when the message was received by the operator and delivered. We held that there was no liability on the part of the telegraph company if the message was not received at Haw River in time to be transmitted to High Point and received there by the operator within reasonable office hours. The evidence was that the office at High Point had closed at 8 o'clock P. M. In *Carter's case* the message was sent from Spout Springs and received by the operator at Sanford, and the negligence consisted in the fact that the latter received the message for delivery without objection and left the sender to understand that his message would be delivered that night. In *Cates' case* we referred to *Carter's case* and said: "The two cases differ essentially in this, that in this case the operator at High Point did not receive the message until 8 o'clock the next morning." There was no negligence in delivering the message after it was received at High Point. It is clearly stated in *Carter's case* that, in order to relieve the company from liability, either the operator at the initial point must refuse to accept the message, if it is tendered for transmission after office hours, or, if he sends it, it must appear that the office at the other end had closed, it being after office hours, which are reasonable, or that the operator refused to receive it unless upon condition that it would not be delivered at night, but the next morning, *of which fact the sender is duly notified.* The quotation in *Cates' case* from *Carter's case* is followed immediately, in the latter case, by this language: "Had he done so" (that is, had he notified the sender that the message could not be delivered that night), the latter could have resorted to other means of notifying the doctor. The operator can accept a message after office hours to be sent conditionally, but it is not fair to the sender to keep him in ignorance of the facts, and the law requires that if it cannot be delivered, and especially if it is of an urgent nature, the sender should be informed, so that he may take other steps to notify the physician to whom it is sent and whose services are wanted.

In this case the operator agreed "to send it if there was nothing the matter at the other end of the line." This meant, if the office had not closed at that end or there was nothing to prevent the operator there from receiving it. If there was anything which prevented the operator there from either receiving it or delivering it that night, the sender should have been notified, and, certainly, when the urgency of the message is considered. "It is the duty of the company in all cases where it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence *per se,* it is clearly evidence of negligence. In many instances, by such a course, the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would *tend* to show diligence on the part of the company." *Hendricks v. Tel. Co.,* 126 N. C., 304. Applying that principle to this case, if the sender had been notified that the message could not be delivered, he could have communicated with Dr. Brookshire in some other way, as he afterwards did, and prevented the mental anxiety he suffered from the delay caused by the defendant's negligence in failing to notify him. The plaintiff had the right to suppose that his message had been delivered, if the defendant performed its duty, and it was negligence not to inform him of the true situation. *Shaw v. Tel. Co.,* 151 N. C., 638.

There is evidence in this case from which it can reasonably be inferred that the sending operator was notified that the message had been received and would be delivered, though what he said to the sender was excluded by the court. I think there was sufficient evidence for the jury upon the question of negligence. Whether the period of the plaintiff's mental suffering was long or short cannot affect his right to recover, but only the quantum of damages, and this was a question for the jury.

The opinion of Dr. Brookshire as to the condition of the plaintiff's wife, when he arrived at their home, was relevant, and competent as corroborative and substantive testimony. The objection was based on the ground, I presume, that the plaintiff could not recover damages merely because his wife was ill. That is true; but the testimony was not offered for that purpose. It was relevant to prove that her condition was serious, if not critical, in order that the jury might infer therefrom that the plaintiff suffered mental anguish. It was this fact, coupled with the failure of the physician to come, that produced the mental suffering, and the doctor's testimony was, therefore, but evidence of one of the substantive facts to be established. It was also corroborative of the plaintiff's testimony as to his wife's dangerous condition when he left her. It was just because she was so ill that he wanted the doctor as soon as he could come, and believing that he had been duly notified, and not knowing why he did not come, was what caused his mental suffering.

There cannot, I think, be any doubt as to the character in which the defendant's operator received the message at Bridgewater. He was acting as agent or operator for the defendant and the railroad company. The message was transmitted by the defendant's operator at Nebo, and the testimony of C. B. Patton, the operator at Bridgewater, shows that he was acting for the defendant. The defendant, in its prayers for instruction, assumes that he was so acting, and we find none which disputes his authority so to act. Such a point cannot be made on a motion to nonsuit when the evidence as to it was introduced by the defendant. We can consider only the evidence introduced by the plaintiff and so much of the defendant's as is favorable to him. The charge was clear and forceful and stated to the jury the real question presented in the case. The pivotal question was, Did the agent at Nebo notify the plaintiff that the message would be delivered that night? and this they answered against the defendant's contention.

BROWN, J., dissenting: The facts in this case as testified to by the plaintiff are that, his wife being quite ill, he desired to summon a physician from Bridgewater, 6 miles distant.

It was past 9 o'clock, and the defendant's offices at Nebo, where plaintiff resided, and at Bridgewater were both closed to business for the night. Plaintiff sought the Nebo operator at his residence and aroused him out of his bed and requested him to send the message. The operator agreed to do so "if there was nothing the matter at the other end of the line."

The message, offered in evidence by plaintiff, is stamped "Received at Bridgewater, 9:30 P. M." As the Western Union wires were closed for the night, it appears in evidence that the message was sent over the railroad block wire, and received by the operator at Bridgewater while working for the railroad. It appears that the operator at Bridgewater, a village of about 100 inhabitants, worked for the Western Union Telegraph Company and the railroad company, jointly, during the day office hours, which closed at 8 P. M. After that the same operator worked the railroad block wire at night, which governed the running of the trains. It belonged to the railroad, and no business messages were ever received over it. Upon receipt of the telegram in question, the operator at Bridgewater immediately informed the operator at Nebo that he could not deliver the message until 11 P. M., as he was blocking trains for the railroad (a matter of vital importance) and there was nobody awake in Bridgewater by whom he could send it.

The plaintiff testifies that he waited at his residence until near 11 o'clock, and then rode to Bridgewater for the physician, who reached his wife's bedside before 1 o'clock A. M. the same night.

1. The ground upon which the Court bases its opinion is that the operator at Nebo should have at once notified the plaintiff that the message could not be delivered at Bridgewater until after 11 o'clock, so plaintiff could have started at once across country.

I agreed to the opinion of the Court in *Carter's case,* which holds that if for any reason a telegram cannot be delivered it becomes the duty of the company to inform the sender, so he can have opportunity to supply the deficiency. But that doctrine ought not to be applied here, because it must be admitted that there was no waiver of office hours and no unconditional acceptance of the telegram, as in *Carter's case.*

The operator at Nebo accepted the plaintiff's telegram, and got up out of his bed to send it, upon condition that it could be promptly delivered, for that is what the language used means. This is not a waiver of the defendant's rights. The operator could have refused to accept the telegram, and when accepted upon condition the plaintiff is bound by the condition.

In *Cates v. Tel. Co.,* 151 N. C., 501 (which I think is direct authority barring a recovery in this), *Mr. Justice Walker,* quoting from *Carter's case,* says: "We need not discuss that in this case, for, conceding that 7 P. M. was a reasonable hour for closing the defendant's office at Spout Springs, it waived it, so far as sending the message was concerned, by actually sending this message and receiving pay therefor. This was, it is true, not a waiver as to the receiving office. But that office waived the closing-hour limitation by receiving the message without demur. Had the operator at Sanford immediately replied that he could not undertake to deliver the message until next morning, and would consider it as not received, except on that condition, there would have been no contract to deliver. But the operator at Sanford did not make any objection to the receipt of the message at that hour, and says he did not make any effort to let the sending office know that it would not be delivered."

The very thing that the operator at Sanford failed to do, the operator at Bridgewater did do, viz., notify the Nebo office at once that he could not make delivery. This was in effect a refusal of the Bridgewater operator to receive the message. Thus, according to *Carter's case,* there was no waiver of office hours at Bridgewater. Now, if the Nebo office received the telegram only on condition, and the Bridgewater operator refused to waive office hours, how can plaintiff recover under the authority of *Cates' case* as well as *Carter's?*

2. I think, upon the admitted facts, that the telegraph company is not liable for the acts of the operator at Bridgewater. He was not the agent of the telegraph company after 8 P. M., and not acting for it. After that hour he worked exclusively for the railroad company on its block wire, and received plaintiff's telegram over the railroad's wire, and not over the defendant's.

I know of no principle of law by which the telegraph company can be held responsible for the unauthorized act of a person not pretending to act for it and actually operating the wire of a railroad in operating its trains. So we have it that plaintiff's message was not sent over defendant's wire and not received by its agent. How can the defendant be liable?

3. The court permitted the following evidence to be introduced: The witness was then asked the following question: "What condition did you find Mrs. Carswell in when you arrived? State the extent of her suffering, and whether it appeared to be great or small?"

To these questions and answers thereto the defendant objected. Objection overruled, and the defendant excepted.

A.: "She was suffering from clots. She was suffering considerably."

This action is not brought by the wife, but by the husband to recover damages for his alleged mental anguish in a brief delay in procuring a physician. According to plaintiff's own evidence, he was delayed only one hour in starting for the doctor, and for this supposed one hour's anxiety he has been awarded $300.

It must be admitted that the evidence introduced had no relation whatever to plaintiff's cause of action, and it was well calculated to prejudice and excite the minds of the jury, and tended inevitably to aggravate the damages.

The wife's condition was not brought about by the negligence of the defendant, and the condition the doctor found her in is irrelevant entirely to the issues in this case, and the evidence should have been excluded.

It is not a case of "harmless error," as it was highly prejudicial to defendant.

MR. JUSTICE MANNING concurs in this dissenting opinion.

D. J. McDONALD v. MACARTHUR BROS. COMPANY.

(Filed 20 December, 1910.)

1. **Parties—Nonresident Plaintiff—Right of Action—Courts—Jurisdiction.**

A nonresident plaintiff may maintain his action in our courts, and he may recover for work done in constructing a railroad situated in this State, and establish his lien on the roadway so constructed, and bring an attachment thereon. U. S. Constitution, Art. IV, sec. 2; Revisal, sec. 440.

2. **Practice—Jurisdiction—Demurrer—Pleadings—Waiver.**

A plea to the jurisdiction of the court over the parties and subject-matter of an action, or that the complaint does not state a cause of action, is not waived by filing an answer, as such may be made at any time, even in the Supreme Court, *ore tenus*.

3. **Courts—Jurisdiction—Foreign Contracts—Parties—Foreign Defendants—Cause of Action Here.**

When an action is brought by a nonresident plaintiff for breach of a written contract signed in another State, the written contract is not the cause of action, but breach in the performance thereof here, and the plaintiff may maintain his action, as the cause thereof arose in this State. Revisal, sec. 440.

4. **Contracts—Acceptance—"Final Estimate" of Work—Fraud in Law—Intent—Instructions—Right of Action.**

The plaintiff was a subcontractor of defendant, which was in turn a subcontractor of M. & Co., to build a railroad, the contract between M. & Co. and the original contractor, which was binding upon plaintiff, providing that the latter's engineer should certify that the work had been performed and accepted by the engineer. It was set up as a defense that the plaintiff could not maintain his action until the certificate had been obtained. It was found by the jury, in response to appropriate issues, that a "final estimate" had been rendered the plaintiff by M. & Co., but was grossly inadequate: *Held*, (1) not error for the court to instruct the jury that if the estimate referred to contained such error of judgment as amounted to a mistake so gross as to necessarily imply bad faith, and to amount to fraud upon the rights of plaintiff, it was unnecessary to show the intention to commit a fraud or to act in bad faith, the court having correctly charged as to what constitutes legal fraud; (2) the jury having found that plaintiff had legal excuse to bring his action, a judgment in his favor will not be disturbed.

APPEAL by defendant from *George W. Ward, J.*, at May Special Term, 1910, of McDOWELL.

The facts are sufficiently stated in the opinion of *Chief Justice Clark*.

McCormick, Henson & Brown, Pless & Winborne for plaintiff.

Hudgins, Watson & Johnston, Justice & Broadhurst for defendant.

CLARK, C. J. This action was brought against the S. and W. Railroad Company and its successor, the C. C. and O. Railroad Company, and the Meadows Company, which was the original contractor for the whole work, and the appellant MacArthur Company, to whom the contract was sublet, they in turn subletting 18 miles of the work to the plaintiff. At the trial a nonsuit was taken as to the Meadows Company, except to the extent that the debt due by it to the MacArthur Company had been attached by the plaintiff to satisfy any judgment he might obtain against the MacArthur Company. There was also a nonsuit as to both railroad companies, except to the extent that it might be necessary to sustain the lien claimed by the plaintiff for work and labor done. So that practically the contest is between the MacArthur Company, the original subcontractor, and the plaintiff, its subcontractor.

The record is voluminous and the argument was very full, but the points decisive of the case are few in number and not difficult. The judge finds that the defendant was duly served with process and that an attachment had been duly issued and executed on the Meadows Company and the garnishee summoned, who filed an answer admitting an indebtedness to the defendant sufficient to pay the amount sued for in this case.

The defendant MacArthur Company moved to dismiss the action on the ground that the plaintiff is a nonresident of this State, that the contract was signed in Virginia, and that the plaintiff was not regularly engaged in carrying on business in this State, and that the subject-matter of this action was not situated here.

The court denied the motion to dismiss the action on the plea of the want of jurisdiction, and found as facts: "That the plaintiff McDonald was at the commencement of this action a nonresident of this State; that the contract sued on was signed in Virginia, but related to work which was subsequently to be done, and was done entirely in this State; that the negotiations, bargains, and dealings, leading up to the execution of the contract were had between the plaintiff and the defendant in this State; that the property on which the lien is claimed is a railroad bed and track in North Carolina, and that the work for which payment is sought was done on said railroad in this State; and that the plaintiff at the commencement of this action was not regularly engaged in business here." The plea in abatement was filed after all the answers had been filed and the case called for trial.

The plea to the jurisdiction was properly overruled. The plaintiff contends that the objection, if valid, was waived by the defendant filing an answer. But not so. When the objection is to a defect of venue or for defective service of summons, or failure of service, such objection is waived by an answer or a general appearance. But where the objection is that the court has no jurisdiction of the person or of the subject-matter, or that the complaint does not state a cause of action, such objection can be taken at any time, and even in this Court *ore tenus.*

A nonresident has full right to bring an action in our courts. *Walters v. Breeder,* 48 N. C., 64; *Miller v. Black,* 47 N. C., 341; *Thompson v. Tel. Co.,* 107 N. C., 456; *Hines v. Vann,* 118 N. C., 6. Indeed, in some cases (for instance, where the sum is too small to sue for in the Federal court) a nonresident plaintiff would be without remedy, unless he has a right to bring suit in our State court. Indeed, Const. U. S., Art. IV, sec. 2, provides: "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The right to obtain justice by an action in the State courts is one of these privileges. Cooley Const. Lim. (7 Ed.), 37. In *Corfield v. Coryell,* 4 Wash. C. C., 380, cited by Judge Cooley, among such privileges and immunities is recited the right "to institute and maintain actions of every kind in the courts of the State."

As to the defendant company, Revisal, 440, provides that one of the cases in which a foreign corporation can be served is "when such service can be made within the State, personally upon the president, treasurer, or secretary thereof." As a nonresident corporation can be sued under such circumstances, and the judge has found as a fact that service was duly had, the presumption (and there is nothing to rebut it) is that this service was thus made. Besides, another case in which that section allows suit against a foreign corporation in our courts is when "the cause of action arose" in this State. Here the cause of action is for work which was done in this State. The contract, though signed accidentally in Virginia, was not the cause of action. It stipulated that the contract was to be performed in this State, and named the prices which were to be paid therefor. This action is not for failure to do the work. The work was done, and done here, and the cause of action is for nonpayment for the same. In any aspect, the court had jurisdiction. The action seeks to attach a sum due by the Meadows Company to the defendant company, and the attachment was duly levied in this State; and, furthermore, to declare and enforce a lien for work and labor done, against the railroad property in this State. This of itself would confer jurisdiction, and the defendant MacArthur Company could have been brought in as a necessary party. Indeed, in transitory actions a nonresident may be sued at common law, independent of statute, in any jurisdiction where he may be found. We have held that a nonresident corporation may be sued here, though it has done no business in this State, if service can be had upon its officer who is here only temporarily. *Jestor v. Steam Packet Co.*, 131 N. C., 54; *Greenleaf v. Bank*, 133 N. C., 292; *Johnson v. Reformers*, 135 N. C., 387.

The other ground relied upon is that under a proper construction of the contract the plaintiff could not institute this action until he had obtained a certificate that the work had been performed and accepted from the chief engineer of the Meadows Company. As to this defense, the court upon the pleadings submitted to the jury the following issues, among others:

2. Did the plaintiff have legal excuse to prosecute this suit without such "final estimate" being rendered? Answer: Yes.

3. Was the paper-writing or statement (called "final estimate" in the answer) which was offered in evidence, of date November, 1908, rendered to the plaintiff by the MacArthur Company, as alleged? Answer: Yes.

4. Was said paper-writing or statement grossly erroneous, as alleged? Answer: Yes.

The court properly instructed the jury: "If you believe from the evidence that the estimate referred to contained such error of judgment as amounted to a mistake so gross as to necessarily imply bad faith and to amount to a fraud upon the rights of the plaintiff, you should answer the fourth issue 'Yes,' and this would be so though there is no evidence of an intention to commit a fraud or to act in bad faith."

There was no dispute that the defendant rendered the plaintiff a final estimate in November, 1908. The court instructed the jury: "The contention of the plaintiff is that this paper-writing, called 'final estimate,' was grossly erroneous, and the plaintiff insists that the amount which you will find due was so far from being insignificant and was such a considerable sum in comparison with the aggregate of the whole work done, that any court and any jury ought to say (the plaintiff insists) that it was not only erroneous, but that it was gross error and such as would amount to a legal fraud." Thereupon the court explained what was legal fraud, and also gave the contention of the defendant. The jury found the issues as above stated. The charge is lengthy and gave the contentions of both parties. We do not find it necessary to reproduce it here. After thorough investigation of the charge, we find no error therein. The findings of the jury as to the facts are conclusive.

The above are the decisive points in the case, and on review of all the exceptions and assignments of error and with the aid of the very learned arguments of counsel, we are able to find

No error.

E. P. GILLAM ET AL. v. J. W. EDMONSON ET AL.

(Filed 20 December, 1910.)

1. **Estoppel—Parties and Privies—Partition—Judgment—Title—Different Right.**

   Estoppel of record will bind parties and privies as to matters in issue between them, but it does not conclude as to matters not involved in the issue, nor when they claim in a different right.

2. **Estoppel—Partition—Judgment—Adjoining Owners—Identity—Issues—Mutuality.**

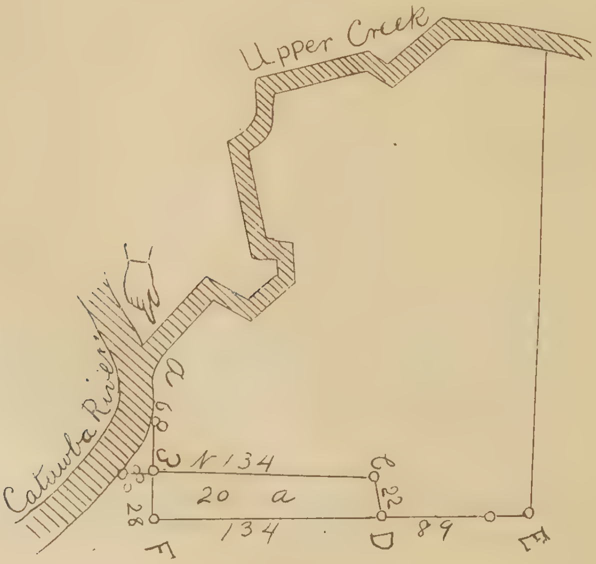
   In partition proceedings between the heirs at law of the deceased, the dividing lines between the *locus in quo* and adjoining owners not being involved and the question involved being only what was a fair division of the lands between the parties, the judgment therein does not estop one of the petitioners to show his true line between his portion and an adjoining owner, not a party to the proceedings, as the identity of that line was not therein involved, and there was no mutuality upon which the application of the doctrine of estoppel could be founded.

3. **Same—Petitioner—Lands Afterwards Acquired—Title—Different Right.**

A judgment in partition proceedings fixing only the divisional boundaries of the *locus in quo* between the heirs at law does not estop the heirs at law from showing the true dividing line between their land and an adjoining tract, nor does it estop one of them, who has afterwards acquired the lands of an adjoining owner to the portion allotted to another of the heirs, from showing the true boundary line of his purchase, as he holds the lands so acquired under the title of his vendor, who was not a party to the partition proceedings, and in such case there could be no mutuality of estoppel upon which its application could be made. (*Carter v. White*, 134 N. C., 469, cited and distinguished.)

APPEAL from *Councill, J.*, at June Term, 1910, of BURKE.

Proceedings instituted before the clerk to partition a small piece of land, transferred to the civil-issue docket. The following plat will indicate and explain the question at issue.



The land sought to be divided is the small piece, rectangular in shape and indicated by the letter B, C, D, F, and the right to partition same was made to depend on the correct placing of the divisional line between the lands formerly owned by Milas Edmonson, deceased, lying to the west of it and the adjoining tract to the east, formerly owned by one S. H. Angell, who bought of A. H. Erwin. The court, being of opinion with plaintiff, instructed the jury accordingly, and verdict was rendered that the true dividing line was that indicated on the map by the letters F, D. Judgment for plaintiff, and defendant excepted and appealed.

Avery & Ervin and J. F. Spainhour for plaintiffs.
S. J. Ervin and John T. Perkins for defendant.

HOKE, J. It appeared in evidence that the tract of land lying west of the dividing line formerly belonged to Milas Edmonson, and on his death plaintiffs and defendants, his children and heirs at law, instituted proceedings for the purpose and same was duly partitioned, the portion lying nearest to an adjoining tract having been allotted to Laura Gillam, one of the petitioners in the present suit, and was set apart to her by metes and bounds, and in which the dividing line between the Milas Edmonson tract and the tract adjoining to the east was recognized and described as being the line B, C, D, E. The present petition instituted by plaintiffs, children and heirs at law of the same Milas Edmonson, against J. W. Edmonson, and Mary Clontz, the other children and heirs at law, proceeds upon the theory that the true dividing line between the Edmonson and the Angell lands was the line F and E, and that no partition has ever been had of the portion contained in the rectangle B, C, D, F. It appeared further that J. W. Edmonson, one of the children and heirs at law of Milas, who was a party to the first partition proceedings, having since bought the adjoining tract from S. H. Angell, resists further partition on the ground that the parties to the original proceedings are estopped to allege or show that the dividing line between the Edmonson and Angell tracts was other than the line B, C, D, E, as recognized in that case; but the position cannot be sustained. The doctrine is that an estoppel of record will bind parties and privies as to matters in issue between them, but it does not conclude as to matters not involved in the issue, nor when they claim in a different right. As to the proposition contained in the first portion of this statement, it has come to be well recognized that the test of an estoppel, by judgment, is the identity of the issues involved in the suit. *Tyler v. Capehart*, 125 N. C., 64; *Tuttle v. Harrell,* 85 N. C., 456; 23 Cyc., 1300; 24 A. and E., 780; Black on Judgment, sec. 609, and on the facts presented, there is an entire lack of this essential requisite. In the former suit, the question at issue, on the title admitted to have descended to the parties from their father, Milas Edmonson, was what was a fair division of their ancestor's land as the parties then understood them to be? The dividing line between their land and the adjoining tract, then owned by S. H. Angell, was not involved in the suit; S. H. Angell was not a party, and no evidence on that question could have been properly offered or received. Perhaps the controlling principle in this doctrine of estoppel is that it must be mutual. Suppose the boundary, as declared in the original proceedings, had taken in a part of Angell's land, and on entry by Mrs. Gillam, Angell had sued, would the recognition of the line as made by the heirs of Edmonson in their partition proceedings have been binding on Angell? To state the question is to answer it, and the answer conclusively shows that no estoppel arises in defendant's favor. Defendant is now endeavoring to maintain his position, not as the heir at law of Milas Edmonson, but as the owner of Angell's title, and the question now raised, the dividing line between the Edmonson and the Angell tracts, was in no way presented or involved in the other suit, and the determination of that case, therefore, should have no effect upon the present issue. There is nothing in the case of *Carter v. White*, 134 N. C., 469, to which we were referred by counsel, that in any way conflicts with our ruling on the present appeal. In that case it was held, "That a judgment in partition proceedings, determining the respective interests of the parties thereto, is binding on said parties as against an after-acquired title."

That was put on the ground that as our system of procedure provided for a decision on title in partition proceedings, a judgment therein would conclude the parties as to the title to the land embraced in the petition, and that an after-acquired title would inure to feed the estoppel; but in our case, as shown, there was no dispute as to the Milas Edmonson title in the first partition proceeding, and the question as to the dividing line between this and the adjoining tract was in no way presented or involved.

There is no error, and the judgment below is affirmed.

No error.

R. B. TURNER v. SOUTHERN POWER COMPANY AND CATAWBA POWER COMPANY.

(Filed 20 December, 1910.)

1. **Electricity—Furnishing Lights—Public Service—Duty.**

   A contract entered into by an electric power company to furnish electricity for a given number of lights or for a given amount of power must be construed and determined according to the general principles of the contract as to the amount of power or light to be supplied, and the obligations assumed by the company under the contract are, as a rule, absolute; but the duties incumbent on the vendor company, by reason of the dangerous nature of electricity and as to the methods and appliances for its proper use and delivery, in the absence of specific stipulations concerning them, are to be considered as arising, in part, from the position the parties have assumed towards each other, and to be determined under the general principles of the law of negligence.

2. **Same—Public Service—Corporations—Negligence—Stipulations.**

   A corporation engaged in furnishing electric power and lights to its patrons in the exercise of chartered rights and privileges conferred by the lawmaking power, in part for the public benefit, are *quasi*-public corporations, and may not stipulate against their own negligence or transfer the obligations incumbent upon them, in the absence of legislative authority to do so.

3. **Electricity — Furnishing Lights — Public-service Corporations—Dangerous Instrumentalities—Care Required.**

   While the law does not regard a *quasi*-public corporation, furnishing electric power and light to its patrons, as insurers against injury arising to them from its use, it owes to them the duty to protect them by exercising the highest skill, the most consummate care and caution and utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances obtainable, consistent with the practical operation of the plant.

4. Negligence—Evidence—Res Ipsa Loquitur.

When a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from a want of care.

5. Same—Burden of the Issue—Questions for Jury.

Where the doctrine of *res ipsa loquitur* applies, the question of a defendant's responsibility must be referred to the jury, not under any presumption changing the burden of the issue, but as presenting a cause in which evidence has been offered from which negligence on the part of the defendant may be inferred.

6. Same.

Where the application of the doctrine in question is properly called for, its effect and operation are not displaced or removed because there is testimony offered which if accepted by the jury would exonerate the defendant, for in such case the credibility of the evidence relevant to the inquiry is for the jury. They may accept or reject it.

7. Same—Electricity—Nonsuit.

Where it appeared that plaintiff on entering his store in the early evening took hold of the electric lamp suspended from the ceiling by a cord, to turn on the light in the ordinary and usual way and in the same manner he had been accustomed to do without injury for a year or more, and under like conditions, and received an electric shock causing serious physical injury; and it further appeared that the amount of voltage stipulated for in the contract between the parties is not likely to produce any harmful results if proper care is observed in its transmission; and further, that all the appliances within the building, which were in the care and control of other persons, were at the time in good order, and the question of defendant's responsibility was confined to the operation and conditions of the appliances and wires used in conveying the electricity into the building, and which were in the exclusive care and control of the defendant: *Held*, the doctrine of *res ipsa loquitur* applies, and the trial court properly refused to nonsuit plaintiff on the alleged ground that there was an entire lack of testimony to sustain plaintiff's cause of action.

APPEAL from *E. B. Jones, J.*, at January Term, 1910, of MECKLENBURG.

Civil action to recover damages for injury caused by alleged negligence on the part of defendants. It was shown, at the trial, that on 25 December, 1908, plaintiff entered his store at some time in the early evening to make a sale to some one, and as he caught hold of the electric lamp, suspended from the ceiling by a cord, to turn on the light in the ordinary and usual way, his hand was caught and held by the current, rendering him, for a time, unconscious, severely burning his hand and causing permanent injury to same. That the electricity was conveyed to the building by defendant companies, under a contract to furnish same for a given number of lamps, at the ordinary voltage, stated to be, for that purpose, 110 volts, and that the appliances within the building for distributing the light to the different lamps was supplied by a different company, acting independently of defendants, except the bulb for this particular lamp, which had been bought from defendants a short time before. There was evidence, on the part of plaintiff, tending to show that the appliances, within the building, procured from other persons, were examined by an expert the day after the injury and found to be in good shape, and that on the position of plaintiff, when injured, and under conditions in the building which then and usually obtained, the amount of electricity and at the voltage contracted for, would not produce the effects which were shown to have resulted. That plaintiff took hold of bulb, in this instance, as he had been accustomed to do since the light had been installed, and same had never caused any bad effects before or given indications that anything was wrong.

There was evidence, on the part of the defendant, tending to show that they have supplied electricity under the contract, to the amount and voltage stated, and conveyed the same to the building as claimed; that they had installed a meter and switch, with the appliances required for properly protecting the house; that no official report of the occurrence had been made directly to the office, but that, having noted an account of it in the morning paper, the appliances referred to for supplying the electricity were examined and tested by their experts on the afternoon of the day succeeding the occurrence, and their appliances, the ampere plugs, etc., for controlling the volume and voltage showed to be in good order, and also the charts connected with the transformer gave indication that the proper amount of electricity had been distributed, etc.

Speaking to this particular implement and its use and purposes and the evidence afforded by these charts, W. W. Hanks, a witness for defendant, testified: "These are registered on an automatic instrument that shows, in order to get an excessive voltage at the point Mr. Turner came in contact with it, it would have to be in contact with some other source of higher voltage. The system was all right, and it would have to be from some foreign wire or from a primary wire not on the system."

There was, further, some evidence offered by defendant to the effect that at a point near where this particular light was suspended from the ceiling the floor had been saturated with the brine from a pile of meat, and that by standing on that point the voltage at 110 might be accelerated or increased so as to import danger to one handling an exposed wire supplying electricity for the lamp, etc.

The cause was tried on the ordinary issues as for negligent injury, and responsibility of defendants was determined under the principles applicable to demands of that nature. The court imposed throughout on plaintiff the burden of the issue as to defendants' negligence, and under several prayers for instructions offered by defendants he charged the jury that if the injury was caused by reason of defective socket or other appliances in the building, the defendants would not be liable, and in effect excluded every cause or feature of responsibility except that which might arise from an excess of voltage negligently conveyed or allowed to enter into the building by reason of the defective appliances of defendants. On the standard of care the court charged the jury, among other things: "That while the law does not regard an electric light company an insurer against injury, such a company owes to its patrons the duty to protect them from injury, by exercising the highest skill, most consummate care and caution, and the utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances obtainable, consistent with the practical operation of its plant. So it is something more, under the law, as the court understands it, than ordinary care; it is the highest care."

Verdict and judgment for plaintiff, and defendant excepted and appealed.

Burwell & Cansler and R. S. Hutchison for plaintiff.
Osborne, Lucas & Cocke for defendant.

HOKE, J., after stating the case: We are of opinion that this cause has been tried on correct principles and that no reversible error appears of record. Where an electric light and power company, operating under a *quasi*-public charter, enters into an ordinary contract to furnish electricity for a given number of lights or for a given amount of power, the obligation as to the amount of power or light to be supplied must be construed and determined according to the general principles of contract, which, as a rule, are absolute; but, in reference to the duties incumbent on the vendor or company, by reason of the dangerous nature of electricity and as to the methods and appliances for its proper use and delivery, these, in the absence of specific stipulations concerning them, should be considered as arising, in part, from the position the parties have assumed towards each other, and to be determined under the general principles of the law of negligence. A distinction illustrated and applied in the recent case of *Dail v. Taylor,* 151 N. C., p. 284, a case in which liability was established by reason of a breach of a legal duty on the part of the defendant, incident to the contract relations between them, and "not contained within its express terms and stipulations." And where the principle applies they may also be said to rest upon the obligation that every *quasi*-public corporation is under to perform its duties properly when they have dedicated their property to a public use and are in the exercise of chartered rights and privileges, conferred by the lawmaking power, in part for the public benefit. From this it would seem to follow that such companies would not be at liberty to stipulate against negligence, nor to transfer the obligations incumbent upon them, without legislative sanction. The case has been tried substantially according to the principles indicated, and the degree of care obtaining in such cases has been correctly stated in the charge. Owing to the very dangerous nature of electricity and the serious and often fatal consequences of negligent default in its control and use, the law imposes a very high degree of care upon companies who manufacture and furnish it, and the exacting requirements laid down by his Honor below is in accord with well-considered authorities in this and other jurisdictions. "The utmost degree of care" was the language adopted and approved in *Haynes v. Gas Co.*, 114 N. C., pp. 203-211. Said *Burwell, J.*, delivering the opinion: "The danger is great, and the care and watchfulness must be commensurate with it." In *Electric Co. v. Lawrence*, 31 Col., p. 308, it was held: "While a corporation furnishing electric light to others for private gain may not be regarded as an insurer, it owes its patrons the duty to protect them from injury by exercising the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances which is attainable, consistent with the practical operation of its plant." And in *Brice v. Wheeling Electric Co.*, 62 W. Va., 685, it was held that "Electrical companies are required to exercise the highest degree of care in reference to the condition, maintenance, and inspection of their wires and appliances."

In approving these formulas as to the degree of care required in such cases, the Court does not intend to hold that there is a varying standard of duty in this State by which responsibility for negligence is determined. Speaking to a similar question in *Fitzgerald v. R. R.*, 141 N. C., 536, the Court said: "They were, therefore, charged with a high degree of care in this respect. This statement imports no infringement on the doctrine which obtains with us, that there are no degrees of care so far as fixing responsibility for negligence is concerned. This is true on a given state of facts and in the same case. The standard is always that care which a prudent man should use under like circumstances. What such reasonable care is, however, does vary in different cases and in the presence of different conditions, and the degree of care required of one, whose breach of duty is very likely to result in serious harm, is greater than when the effect of such breach is not near so threatening."

It was earnestly urged for error that the judge below refused to nonsuit the plaintiff, and this chiefly on the ground that there was no direct evidence that electricity had been negligently transmitted into the building by defendants and in excess of the voltage stipulated for in the contract. The court was also asked to charge the jury to the same effect, but the position, in our opinion, cannot be sustained. The presiding judge charged the jury that if the injuries resulted by reason of defective apparatus or appliances existent within the building, they would render their verdict for defendants, and in effect excluded from the consideration of the jury any and all imputation of wrong except that which might arise by reason of an excess of voltage transmitted into the building over the wires of defendants and by reason of negligent default on the part of the company or their agents. This being true, on the facts in evidence, the case permits and calls for an application of the doctrine of *res ipsa loquitur* and requires that the question of defendant's responsibility should be determined by the jury. This doctrine has been discussed and applied in several recent cases before this Court, as in *Dail v. Taylor,* 151 N. C., 284; *Fitzgerald v. R. R.,* 141 N. C., 530; *Ross v. Cotton Mills,* 140 N. C., 115; *Stewart v. Carpet Co.,* 138 N. C., 66; *Womble v. Grocery Co.,* 135 N. C., 474; and in general terms will be found very well stated in the fifth headnote to *Fitzgerald's case, supra,* as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." And this statement will be found in accord with well-considered cases in other courts, as in *Griffin v. Manice,* 166 N. Y., 188; *Hawser v. R. R.,* 80 Md., 146; *Sheridan v. Foley,* 58 N. J. L., 230; *Armour v. Golkouska,* 95 Ill. App., 492.

These and numerous other authorities on the subject will disclose that it is not the injury alone that can call for the application of this doctrine or maxim, but the injury and the facts and the circumstances immediately attending it and constituting together the occurrence or event which present the conditions when it may be properly allowed to prevail. Thus in Shearman and Redfield on Negligence, sec. 59, the authors say: "In many cases the maxim *res ipsa loquitur* applies; the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer." As shown in the note to *Fitzgerald's case,* in 6 L. R. A. (N. S.), pp. 361 and 363 (141 N. C., 530), the term *res ipsa loquitur* has been sometimes inaccurately applied to cases where, in addition to facts and attendant circumstances, more or less objective in their nature and sufficient to indicate that negligent default is the more reasonable probability (*Dail v. Taylor, supra*), there is testimony *ultra* tending to indicate personal agency in producing the result complained of, presenting rather an ordinary case of proof by circumstantial evidence. But the doctrine in strictness applies when the injury and the facts immediately attendant being otherwise sufficient, this direct evidence of personal responsibility is lacking; and this, we think, is the case presented here.

Under the facts submitted for the consideration of the jury and as accepted by them, all the means, implements, appliances for the generation, transmission, and delivery of this fluid, "this manifestation of kinetic energy," as a very intelligent expert termed it in answer to an inquiry by the writer, were under the control and management of defendants and their agents. Under these circumstances the plaintiff takes hold of a lamp to turn on the light in the same manner he has been accustomed to do without injury for a year or more and under like conditions, and receives an electric shock causing serious injury; and it is established, furthermore, that the amount of voltage stipulated for in the contract—even more than that—is not likely to produce harmful results if proper care is observed in its transmission. The usual and ordinary evidence in explanation available is in possession of defendants, peculiarly so in a case of this nature; this last condition being referred to by *Connor, J.*, in *Womble v. Grocery Co., supra,* as the basis of the maxim, and in such case as stated the question of defendant's responsibility must be referred to the jury—not, as shown by these authorities cited, under any presumption changing the burden of the issue, but as a cause in which evidence has been offered, from which negligence on the part of the defendant may be inferred. Speaking to this special feature of the doctrine in *Womble's case,* it is said: "The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not, we think, raising any presumption in her favor, but simply entitling the jury, in view of all the circumstances and conditions, as shown by plaintiff's evidence, to infer negligence and say whether, upon all the evidence, the plaintiff has sustained his allegation." Where the application of the doctrine we are discussing is properly called for, its effect and operation are not displaced or removed because there is testimony offered which if accepted by the jury would exonerate the defendant, for in all such cases the credibility of the evidence relevant to the inquiry is for the jury—they may accept or reject it. Undoubtedly, and having in view the high degree of care required in causes of this character, if it should be shown that a defendant has taken all reasonable precaution and used all the regulating and preventive appliances obtainable and recognized as practicable, and notwithstanding this the injury has occurred, in such case the defendants should be exonerated. There may be cases where the explanation offered in evidence is so full and satisfactory that a court would be justified in charging the jury, "If they believe the evidence, the defendants are entitled to their verdict." It is recognized that this is a dangerous agent, whose properties are not as yet fully known or understood, and from what is known, it appears that at times an amount and voltage of electricity which is ordinarily and reasonably treated as harmless may cause serious and even fatal results either from some condition of the injured person or other adventitious cause, which defendant may not be able either to foresee or prevent; and, therefore, when a company shows to a jury, by testimony which they accept as worthy of credence, that it has done all that the highest degree of care could reasonably require in reference to the "condition, maintenance, and inspection of their wires and appliances," they should render a verdict relieving defendant of liability. But on the facts presented in this case, and for the reasons stated, the court properly refused to nonsuit the plaintiff or to hold, as requested, that there was no evidence of negligent default. The objection made to allowing an amendment in the midst of the trial, charging negligence by reason of a defective bulb bought of one of the defendants, and the evidence tending to support it, has become immaterial in view of the charge relieving defendants from any and all imputation of negligence on that account. There is no error, and the judgment entered below is affirmed.

No error.

ELIAS MARLOWE v. DRURY BLAND.

(Filed 20 December, 1910.)

1. **Master and Servant—Tortious Act—Respondeat Superior—Test—Employment.**

Upon the question of the responsibility of the master for the acts of the servant, by reason of implied authority, the test is whether the tortious act complained of was committed in the course of the servant's employment and within its scope.

2. Same—Tortious Acts—Authority Implied—Evidence.

When the master has given direction to his servant, a "hired man," to cut and pile cornstalks in his field, which was done by the servant, and then, without direction from the master, and in his absence, he set fire to the stalks, which caused sparks to be carried by the wind, which set fire to and destroyed plaintiff's property, the doctrine of *respondeat superior* does not apply, the thing the master ordered his servant to do being harmless in itself, and there being no express or implied authority given the servant to burn the stalks, which alone caused the damages complained of.

APPEAL from *Webb, J.*, at February Term, 1910, of RUTHERFORD.

Civil action to recover damages for negligently allowing fire to get out in a neighbor's woods and thereby causing damage, etc. There was evidence tending to show that defendant had a hired man, named Major Melton, and, on 22 March, 1907, he directed Melton to cut and pile some cornstalks in a 4-acre field on defendant's place, and after giving these directions went off with a load of lumber; that Melton went at the work he was given to do; cut and piled the stalks, as directed, and then proceeded to set fire to them; that there was wind blowing at the time, and the fire having been set at a point about 10 steps from the woods, sparks were blown by the wind over into the woods of plaintiff, causing a fire and doing $200 or $300 of damage.

Major Melton, the hired man, being examined as a witness for plaintiff, among other things, testified: "Bland sent me to the field to cut and pile the stalks. . . ." On his cross-examination the witness stated: "The wind was not blowing at the time I piled up the stalks. I did not tell any one I was going to burn the stalks, I just set the stalks on fire. No wind when I set fire to the stalks. Defendant didn't tell me to set them afire. I just thought, while I was out there, I would burn them. I tried to stop the fire, but couldn't. He turned me off because I set the fire out."

Defendant offered no evidence. At the close of the testimony, on motion duly made, there was judgment of nonsuit, and plaintiff excepted and appealed.

McBrayer, McBrayer & McRorie for plaintiff.
No counsel contra.

HOKE, J., after stating the case: We are of opinion that, on the facts of this case, the judgment of nonsuit should be affirmed. In *Sawyer v. R. R.,* 142 N. C., 1, that being an action for slander by reason of certain defamatory words uttered by the superintendent of the road, in conversation with an applicant for employment, after he had told such applicant that the company did not wish to employ him, it was held, generally, in reference to the maxim *respondeat superior:*

"2. Where the question of fixing responsibility on corporations by reason of the tortious acts of their servants depends exclusively upon the relationship of master and servant, the test of responsibility is whether the injury was committed by authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it.

"3. Where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized."

And the Court, in the opinion, sustaining a judgment of nonsuit, said: "The test of responsibility established by the better considered authorities being 'whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it,' when such authority is express, the matter is usually free from difficulty; but the authority may be implied, and, on a given state of facts admitted or established, frequently is conclusively implied, and responsibility imputed as a matter of law." And on the same subject quotes with approval from Wood on Master and Servant, sec. 279, as follows: "The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability, in all cases, depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it." And further, section 307: "The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders." And in *Roberts v. R. R.,* 143 N. C., 176-179, being an action against a railroad company for an assault and battery committed by one employee on another, the same author, section 288, is quoted as follows: "An employer who leaves to an employee to do certain acts for him according to the employee's judgment and discretion is answerable for the manner or occasion of doing it, provided it is done *bona fide* and within the scope of the servant's express or implied authority, and not from mere caprice or wantonness and wholly outside of the duties conferred upon him." A perusal of these and other authorities on the subject will disclose that on the question of responsibility of the master, by reason of implied authority, the test is whether the tortious act complained of was committed in the course of the servant's employment and within its scope. *Jackson v. Tel. Co.,* 139 N. C., 347; *Daniel v. R. R.,* 136 N. C., 517; 26 Cyc., pp. 1528-1533; Jaggard on Torts, pp. 256-257. In the citation to Cyc., *supra,* p. 1533, and on this term, "scope of employment," it is said: "In determining whether a master is liable for the torts of his servants, the most difficult question is whether the particular act or omission of the servant causing the injury for which the master is sought to be held liable was committed within the scope of the servant's employment; and this question is in most cases one of fact to be determined by the jury from the surrounding facts and circumstances. The terms "course of employment" and "scope of authority" are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rules, the authority from the master generally being gatherable from the surrounding circumstances. An act is within the scope of the servant's employment, where necessary to accomplish the purpose of his employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. But the act cannot be said to be within the scope of the employment merely because done with intent to benefit or serve the master, not merely because the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master, nor because the servant supposed that he possessed authority to do the act in question." A correct application of these authorities and the principles upon which they rest to the facts presented will, in our opinion, sustain the action of the lower court in ordering a nonsuit.

As a general proposition, the duty of a hired man is to do what he is told, and in this instance he was directed to do a definite, specific thing, importing no menace to any one, and after completing the work that was given him to do, he goes on of his own motion and does something else—engages in an act which is not infrequently a source of danger to neighbors, and does it under circumstances amounting to a negligent wrong and causing substantial pecuniary injury.

Plaintiff did not rely on the inferences which might arise from the fact that his neighbor's hired man while engaged in clearing off a field, on a windy day, set fire to a pile of cornstalks near the plaintiff's woodland, from which it might be reasonably inferred that this negligence was within the scope of his employment, but his own proof goes further, and shows that the employee had no orders to burn these stalks, nor was he sent with general directions to clear off the field, involving some extent of discretion in his method, as in the citation from

Wood, approved in *Roberts' case, supra,* but he was directed to do this specific act, and the course and scope of his employment, in this instance, was to do as he was told. The distinction, we think, finds support in the cases above referred to in our own Reports of *Daniel v. R. R.* and *Jackson v. Tel. Co., supra.* In the first case, recovery was denied where an agent in charge of property of the principal, having reason to believe that some one had committed a theft, without being ordered to do so, caused the arrest of the suspected person, and it was held that the duty of caring for the property did not extend to punishing one who had injured or stolen it, and so the act was beyond the scope of the employment. In *Jackson's case,* an employee of a telegraph company in charge of hands who were placing poles for a new line caused the arrest and imprisonment of an obstructing landowner with the view and purpose of putting him out of the way until they could go through his land. There was no direction to do this on the part of the company, but it was held to have authorized the act because done in the course and scope of the employment.

There are numerous authorities which appear to conflict with the disposition that we make of the present appeal. Many of these, however, as pointed out in *Sawyer's case, supra,* can be distinguished and consistently upheld on the ground that the facts involved a breach of some independent duty that the employer directly owed to the injured person, and do not depend entirely on the relation of master and servant. As in case of injuries received by passengers on trains or in depots of common carriers or customers in a general store, they are there by invitation of the employer, and a duty exists directly between the parties; this is the view we think that the case of *Redding v. R. R.,* 3 S. C., 1, properly presents. True, the recovery there was sustained in a very learned opinion and made to rest chiefly on the ground of agency alone, but we doubt if on the facts appearing in that case the breach of duty owing directly from the employer to the injured person is not the stronger position. In other cases responsibility may be imputed and recovery sustained by reason of intrusting the employee with dangerous implements and agencies, as in *Stewart's case,* 146 N. C., 47, or because the occupation is such as to not unnaturally import menace to outsiders, as in *Hunter's case,* 152 N. C., 682—a principle which forbids that the employer shall be excused even by the interposition of an independent contractor. Again, there are cases where the act complained of was done in furtherance of the work that the employee was given to do and in the course of its performance, as when an employee or numbers of them are sent to clear off a new ground or a railroad right of way; here the employer would be responsible for negligent acts done in furtherance of the work and during its continuance, though the precise method employed at the time might be against the express orders of the employer. The act comes clearly within the scope of the employment. Wood on Master and Servant puts the very case in section 285: "So a master was held liable for the acts of his servants employed to clear land for him in setting fires to burn the brush, and this even when the fires were built against his orders." And *Jackson v. Tel. Co., supra,* and *Wood v. Young,* 42 Ark., illustrates the same general principle. But where, as in this case, a hired man directed to do a definite, specific thing, entirely harmless in itself, and after completing this goes forward without instructions and without the knowledge of employer and does something else which imports a menace to outsiders, thus entirely changing the character of the work he was given to do and not embraced within the terms or meaning of the order—this, we think, can in no sense be considered as within the scope of the employment, and the doctrine of *respondeat superior* has no application.

The judgment of nonsuit will be
Affirmed.

GATTIS G. BEAL v. CHAMPION FIBER COMPANY ET AL.

(Filed 20 December, 1910.)

1. **Contracts—Independent Contractor—Requisites—Respondeat Superior.**

One of the vital elements in the relation of independent contractor is that the person for whom the work is contemplated to be done is interested only in the ultimate result of the work; and when it appears that the owner, under the contract relied on to establish this relationship and avoid responsibility for the contractor's negligent acts, furnished important portions of the material for constructing the appliances and the facilities for carrying on the work; that all purchases and prices of materials and supplies were subject to the approval of the architect or superintendent employed and paid by the owners, and that they had the right to select, control, and discharge the labor employed and fix the price of their pay, the facts are insufficient to establish the relationship of independent contractor, and the doctrine of *respondeat superior* applies.

2. **Master and Servant—Vice Principals—Tests.**

The right of an employee to hire and discharge other servants is not the sole test of this relationship to the master as vice principal, for the principle also obtains when one in charge of other servants is so empowered that the others have just reason for believing that neglect or disobedience of his orders will be followed by their dismissal.

3. **Contracts—Independent Contractor—Evidence.**

In this action, it appearing that there was sufficient evidence for a finding by the jury for plaintiff upon issues as to whether the servant, whose negligent orders caused the injury, was a vice principal, a motion for judgment as of nonsuit upon the evidence upon that ground was properly denied.

4. **Contracts—Independent Contractor—Negligence—Evidence.**

The servant alleging damages in his action against the master as proximately caused by a negligent order of the latter's vice principal, given while erecting a three-story building, there was evidence tending to show: that the servants were engaged in hoisting heavy timbers, and that the usual way to hoist one of them was to place it beneath a "crab" and hoist on a perpendicular; that on the occasion of the injury the rope was fastened to a timber some distance off, giving it a slant and throwing the line beneath and against a rafter which had just before been raised and which rested on the beam where the timbers were to be placed; that in the performance of his duties the plaintiff was standing near the end of this timber preparing to throw the tag rope to a fellow-servant to draw the rafter to its proper place, when the vice principal, without notice or warning, ordered the men at the "crab" to operate it, causing a "crab" rope beneath the timber near which the plaintiff was standing to knock it or pull it off the plate, from which it fell, to the plaintiff's injury; that the plaintiff was not in a position to see or know what was going on, and had no reason to believe the hoist would be ordered at that unusual time: *Held*, sufficient upon the question of negligence.

5. **Contracts—Independent Contractor—Negligence—Unexpected Results.**

When in the hoisting of heavy timbers in the erection of a building a negligent order of a vice principal causes an injury to a servant engaged in the work, without fault on the part of the servant, and it appears that the vice principal knew or should have known that the order would be likely to produce an injury to some of the employees, though the vice principal was not in position to see the servant at the time, the master is not excused from liability for the injury because the result was not exactly what might have been expected.

APPEAL from *Councill, J.*, at September Term, 1910, of BUNCOMBE.

The evidence tended to show that 25 February, 1907, plaintiff, an employee, was engaged with others in putting up a lot of buildings for defendant company at Canton, N. C., the particular building in question being the third floor and roof of the "Extract Building," and while so engaged he received serious injuries by reason of the negligent orders given by one Sam Clayton, a foreman who had immediate charge of this particular work they were doing at the time. On the trial the jury rendered the following verdict:

1. Was the plaintiff, at the time of the injuries complained of, in the employ of the defendant Champion Fiber Company? Answer: Yes.

2. Was the plaintiff injured by the negligence of the defendant Champion Fiber Company, as alleged in the complaint? Answer: Yes.

3. Was the plaintiff guilty of contributory negligence? Answer: No.

4. Was the plaintiff damaged by the negligence of the defendant Champion Fiber Company, and if so, in what amount? Answer: $1,000.

Judgment on the verdict, and defendant excepted and appealed.

James J. Britt and J. F. Ford for plaintiff.
A. S. Barnard for defendant.

HOKE, J. The validity of this trial and judgment is challenged by defendant chiefly on three grounds: (1) That Sam Clayton, whose negligent order is said to have caused the injury, was an employee of one Frank Gilreath, an independent contractor, and for that reason no responsibility for Clayton's acts were properly imputable to defendant. (2) For that said Sam Clayton was in no sense a vice principal of defendant company, but only an ordinary boss of a gang of hands, constituting him a fellow-servant of plaintiff. (3) That on the facts in evidence there was no negligence shown, either on the part of Clayton or any one else, for whose conduct defendant company was responsible. But we are of opinion that none of these positions can be sustained.

As to the first position, in Cooley on Torts, marginal page 646, an independent contractor is defined as follows: "Where the contract is for something that may be done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the person employed by the contractor so as to be responsible to third persons for his negligence." The author cites in support of this position Shearman and Redfield on Negligence, sec. 165, and in which the term is thus referred to: "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant." In a recent work on this special subject, Moll on Independent Contractors and Employers' Liability, secs. 16, 17, 18 *et seq.*, similar definitions from courts of recognized authority are given, thus: "An independent contractor has also been defined to be one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." *Lurton, J.*, in *Powell v. Construction Co.*, 88 Tenn., 692. Again, "The test to be applied is whether the employee represents the employer as to the result of the work or as regards the means. If the former, he is to be regarded as an independent contractor, but if the latter, merely an agent or servant." *Parrott v. R. R.*, 127 Ia., 419. And, "The test generally applied in answering the question who are independent contractors is, Independence of control in employing workmen and in selecting the means of doing the work." The author, section 19, then quotes with approval from Judge Thompson's Commentaries on Negligence. "If the proprietor retains for himself or for his agent (*e. g.*, architect and superintendent) a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is deemed the mere agent or servant of the proprietor, and the rule of *respondeat superior* operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts or not. It is not necessary, in such a case, that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of guidance and control." The principle is very clearly expressed in a Pennsylvania case, *Smith v. Simmons*, 103 Pa., 32: "Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an independent contractor, and in such case the contractor alone and not the employer is liable for damages caused by the contractor's negligence in the execution of the work"; and a like ruling was made in *Faren v. Sellars,* 39 La. Ann., 1011, on facts not dissimilar to these presented here. These definitions have been recognized as sound and upheld in numerous decisions of our own Court. *Thomas v. Lumber Co.,* 153 N. C., 351; *Hunter v. R. R.,* 152 N. C., 682; *Gay v. R. R.,* 148 N. C., 337; *Young v. Lumber Co.,* 147 N. C., 26; *Davis v. Summerfield,* 133 N. C., 325; *Craft v. Lumber Co.,* 132 N. C., 151; *Waters v. Lumber Co.,* 115 N. C., 648. And their correct application to the facts presented are against defendant's first position, as above stated. It appears in evidence that defendant company, engaged in constructing, at Canton, N. C., an extensive plant, to include numerous buildings, for the manufacturing of pulp and tannic acid, on 19 March, 1906, entered into an agreement with Frank B. Gilreath, of the city of New York, to do the work contemplated. True, he is "hereinafter designated as contractor," and, as a general proposition, no doubt he was; but from a perusal of the contract entered into between the parties and in view of the authority and control reserved therein to the company "hereinafter designated as owner," it is manifest in reference to this particular work that the position of independent contractor on the part of Gilreath cannot be maintained. The contract in question, after the usual preliminary statements, provides generally that the work shall be done as outlined on drawings prepared by George F. Hardy, mill architect, and called drawing No. 8613, general plan of mill buildings, "and that said work is to be done under the supervision of this architect and subject to his approval, and he is to be paid by the owner."

Article 3 of the contract is as follows: "The architect will be represented at the work by a civil engineer, who is referred to in this contract as the engineer, and who will have the power which this agreement gives him, subject to the approval of the architect. No alterations shall be made in the work except upon the written order of the architect or engineer. The contractor shall provide sufficient safe and proper facilities at all times for the inspection or laying out of the work by the architect or engineer and shall follow his directions regarding the manner in which the work shall be carried out."

In article 14 it is stipulated: "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified to by the architect as sufficient ground for such action, the owner shall be at liberty after seven (7) days' written notice to the contractor to terminate the employment of the contractor for the said work and enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon and to provide the materials therefor." And further: "The contractor is to furnish and maintain in proper working condition all appliances required on the job, such as engines, pile drivers, derricks, concrete mixers, stone crushers, gravel screens, or in fact any other machinery or plant that may be necessary to enable the work to be done as expeditiously and economically as possible. The owner is to furnish labor to operate the plant, but the contractor is to keep it in repair." And again, same article: "The word 'plant' which the contractor is to furnish and maintain is understood to cover and include all perishable tools, such as picks, shovels, hose, wheelbarrows, structures for crushers and mixing plant, wire falls and hemp rope and piping or fittings; but the owner furnishes all lumber for scaffolds, runways, temporary buildings on the job, except for commissary or lodging purposes, and scaffolds, except contractors' patent scaffold horses."

Articles 5, 6, 7, 8 of the contract are as follows: "The contractor is to carry liability and fire insurance to the extent approved by the owner, and the actual cost of the same is to be borne by the owner. If it shall be necessary for the contractor to pay the traveling expenses of workmen or foremen to obtain them in order to prosecute the work to the satisfaction of the owner, such traveling expenses shall be borne by the owner. It is understood that the contractor shall do all scheduling of materials and obtain all proposals. These proposals to be submitted to the owner and the final purchasing to be done by the contractor or by the owner at the option of the owner, but in any case the owner is to pay the contractor his percentage of profit, which is to be reckoned on their actual cost.

"Article 6. None of the work included in this contract is to be sublet without the approval of the owner.

"Article 7. All bills for purchases are to be rendered in the name of the Champion Fiber Company and are to be paid for by them, and the contractor agrees that all rebates and commissions on purchases shall be credited to the owner.

"Article 8. The labor is to be engaged and be under the control of the contractor, but the owner reserves the privilege of furnishing labor to contractor or discharging men in the employ of the contractor at any time and only on notice to the contractor's foreman in charge at the work. The wages paid to foremen and labor shall be subject to the approval of the owner, who must be consulted as to wages in each class of labor before the employment of same. All payment of wages to be made by the owner, and timekeepers are to be appointed by him."

From these extracts, disclosing as they do that the agreement reserves to the company the right to direct "the manner in which the work shall be carried out," that the company is to furnish important portions of the material for constructing the appliances and facilities for carrying on the work, that all purchases and prices of materials and supplies are subject to the "owner's" approval, and reserving further the right to select, control, and discharge the labor employed and fix the prices paid the same, it sufficiently appears that, while the party of the first part is termed a contractor in the agreement, he can in no sense be considered an independent contractor, but is little more than a general overseer, selected, no doubt, by reason of his capacity and experience, but in fact and in truth himself an employee and servant of the company and rendering the company responsible for negligence committed in doing the work under the general principles of the law of negligence applicable in such cases. To show how complete the work of the laborers employed in it were under the control of the company, on one occasion when some of these employees sent up a request to James F. Powers, superintendent for Gilreath, for shorter hours, etc., in the estimate of the day's work, Powers answered the petition as follows:

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, *Canton, N. C.*

GENTLEMEN:—We have handed your letter of the 7th inst. over to the Champion Fiber Company, and up to this hour have not received a reply. We thêrefore cannot make any statement regarding the matter referred to in your letter.

Yours truly,
FRANK B. GILREATH,
By JAMES F. POWERS, *Superintendent.*

And later, the company made reply to the petition as follows:

CANTON LOCAL UNION, NO. 1806, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA.

GENTLEMEN:—Answering your communication addressed to Mr. James F. Powers, superintendent, we have the following offer to make for your consideration: It is desirable to keep the job running ten hours; we will, however, call your day, for the first five days in the week, nine hours, paying you time and one-half for the tenth hour; on Saturday we will call your day eight hours and pay you time and one-half for overtime. The old rate per day to be basis for day's work. Regarding the matter of paying you during the hours of 1 o'clock and quitting time, we see no objection to this, and agree to see that this is done. If this scale is adopted, it is with the understanding on our part that it is to be in force through the construction of the mill buildings.

Awaiting your reply, we are, Very truly,
THE CHAMPION FIBER COMPANY,
CHARLES S. BRYANT, *Secy. and Treas.*

As to the second position, and under our authorities on the subject, there was evidence tending to show that Sam Clayton, the foreman in immediate charge of the work, was a vice principal. While under some of our former decisions there was intimation if not decision that the power to hire and discharge employees was the test by which this relationship was to be determined, it soon came to be understood and has been repeatedly held with us that the power indicated was only evidential on the question, and the true test is as laid down in *Turner v. Lumber Co.,* 119 N. C., 387, as follows: "The test of the question whether one in charge of other servants is to be regarded as a fellow-servant or vice principal is whether those who act under his orders have just reason for believing that neglect or disobedience of orders will be followed by dismissal," a ruling that has been since approved in numerous cases with us. *Hipp v. Fiber Co.,* 152 N. C., 745; *Lamb v. Littman,* 132 N. C., 978; *Mason v. R. R.,* 111 N. C., 482.

From the facts in evidence it appeared that quite a number of employees were engaged in raising a lot of heavy timbers 8 x 10 and 10 x 12 and 18 and 36 feet in length from the ground floor to the roof of a three-storied building through a space on the second floor of something like 18 feet square. The hoisting was done by means of a crab or powerful windlass, and some of the men were on the ground floor, others on the second floor to assist in guiding, and yet others were at the roof or the plate or beams on which it was to rest, the plaintiff being with this last squad. There was a main or crab line which was fastened to the timber below, piece by piece, and there were guide and tag lines to direct the timber in the ascent and place it when same had been raised to its proper height. It was evidently a work of importance and some magnitude, and dangerous unless coolly and skillfully supervised and directed. One witness testified that he had applied for a transfer from the work on account of the danger attending it. There were quite a number of men engaged in the work, and Sam Clayton, the foreman, whose order, it was claimed, caused the injury, had the entire charge of the work, at the time, and the control and direction of the men who were engaged in it.

Speaking to the question of Clayton's authority, one witness, William B. Turner, stated that he had a conversation with Mr. Powers, the superintendent, with reference to Clayton's ability to *oversee the job,* and further, "That Clayton had power to discharge men, so far as witness knew, but he had never seen him discharge any." Another witness, L. H. Gillespie, testified: "That Clayton had the right to send men to Powers. I remember one man that was sent to Powers and Powers discharged him. This is the only one I remember. Clayton recommended his discharge." Plaintiff, himself, testified: "I know that Clayton could tell men that if they did not do a certain thing they could go to the office to get their time. Clayton gave orders from time to time. If I had disobeyed his orders, he would have sent me to the office and I would have been fired or discharged." This is testimony from which the authority of Clayton, as vice principal, might be inferred, and is of itself sufficient to justify the refusal of the court to charge, as requested, that in no event could said Clayton's negligence be imputed to defendant company, and to nonsuit plaintiff for that reason. And there is ample testimony from which negligence on the part of Clayton could be properly established.

The evidence tended to show that the usual way to hoist one of these timbers was to place it just beneath the crab and hoist on a perpendicular, but on this occasion the rope was fastened to a timber some distance off, and giving it a slant and throwing the line beneath and against a rafter, which had just before been raised and rested on the beam. That plaintiff was standing near the end of this timber preparing to throw the tag rope, as his duty was, to the men who were to draw the rafter to its proper place, when the foreman, Sam Clayton, without any warning or notice and before plaintiff had time to do the work he was given to do, gave the men at the crab orders to go ahead. They turned the windlass, the crab rope beneath the timber near which plaintiff was standing knocked it or pulled it off the plate, and it fell, caught in the rope which plaintiff was handling, wrapped around his leg and dragged him to the concrete floor, causing the injury complained of. The plaintiff was not in a position to see what they were doing below, and he testifies that he did not know and had no reason to think that a hoist would be ordered at the time, as the custom had been to place the timbers just under the crab, carrying them there with a "dolly." True, Clayton was not in a position to see plaintiff, but he knew or should have known that an order to hoist with the crab rope at a slant and touching the piece of loose timber would likely knock it off the beam, and that injury to some one would likely follow. And in such case a company responsible for his acts would not be excused because it didn't happen in the exact way that it might have been expected. *Hudson v. R. R.*, 142 N. C., 198; *Drum v. Miller*, 135 N. C., 204.

There was some evidence to the effect that Clayton had the reputation of being a drinking man, and the character of the order and the tone and language of it would seem to indicate it. One witness said: "If the men did not get around fast enough he would holler at them and tell them to get in a hurry, and he scared them at the crab and they would jerk it around." And another witness, speaking to this very order, said: "I had hold of the crab. I heard some one give orders. The words were pretty rough; he said, 'Pull up there! God damn it! Pull up there!'" And it was a serious hurt. Speaking to the injury, plaintiff said: "I fell straight down. Broke my left thigh, broke both wrists, broke my jawbone in the center, dislocating and breaking my upper jawbone, starting at my nose, clear over. I lost three teeth. By my arm being broken I cannot turn it over to do my work, that is my right arm. I cannot turn my wrist at all. I was in the hospital seven weeks and it was six or seven months before I could walk any. I have never recovered so that I can do my usual manual labor. I am unable to work at my trade as a carpenter because I cannot drive a nail above my head. I suffer pain every morning from my ankle, and it is so weak I cannot walk without a shoe. My wrist is sore and it hurts me to work."

On the question of negligence, the facts in evidence bring the case within the principle of *Hipp v. Fiber Co., supra*, and *Wade v. Contracting Co.*, 149 N. C., 177, and there is no error which gives defendant any just ground of complaint. The judgment will therefore be affirmed.

No error.

W. L. MOORE ET AL. v. B. B. MERONEY AND WIFE, AND TOWN OF MURPHY.

(Filed 23 December, 1910.)

1. **Cities and Towns—Streets—Roads—Corporate Limits—Control.**

   When a public highway enters an incorporated town, or such town builds up on one already existent, it usually follows that the highway, or so much thereof as is within the corporate limits, comes under the regulation and control of the corporate authorities as a part of the public streets.

2. **Cities and Towns—Streets—Roads—Discontinuance—Legislative Powers—Compensation.**

   In the absence of constitutional restraint, the authorities of an incorporated town have power to vacate or discontinue a street or public way, but when such street has been once established they can do so only by legislative sanction expressly given or necessarily implied from powers which are so conferred, and then compensation must be made to abutting owners whose property is injured.

3. **Cities and Towns—Streets—Roads—Obstructions—Changes—Abutting Owner—Damages.**

   When a change is made in its streets, or the street is discontinued by the authorities of an incorporated town by legislative sanction, a landowner, as a rule, is restricted to a claim for the damages arising therefrom to him.

4. **Cities and Towns—Streets—Roads—Changes—Legislative Authority—Taxpayer—Abutting Owner—Right of Action.**

   When a change is made in a street by the authorities of an incorporated town, with or without legislative sanction, the change being recognized as valid, and acquiesced in by the general public, their action cannot be questioned in a civil suit of a private citizen by reason of his being a general taxpayer of the town; but, if maintainable at all, it can only be done by a landowner whose property is affected by the change, and who will suffer some peculiar and special injury by reason of it.

5. **Cities and Towns—Streets—Roads—Dedication—Conduct—Ratification by Public.**

   The incorporated town of M. altered the course of a portion of an old State road within its limits and substituted a broad, commodious street. At that time C. owned land on both sides of the old way, and was the only one whose property was affected. The property of C. abutted on the new street, and he made no objection, but by his fencing and other acts openly acquiesced in the change, inclosing the entire property, included the old way and used it as his own. A part of this property was sold and conveyed to plaintiff, who brings his action against the defendant, who bought the other part, to compel him to remove a house he had erected on the old road, and to compel the town to keep the old road open: *Held*, (1) the conduct of C. amounted to a dedication, and precludes plaintiff, who holds his title, and who purchased with knowledge of all the facts, from maintaining his action; (2) as to whether the public would be estopped from questioning the substitution of the new way for the old by a period of acquiescence, *quære*.

6. **Cities and Towns—Streets—Roads—Deeds and Conveyances—Recitals—Boundaries—Rededication—Evidence.**

The plaintiff in his action seeks to compel defendant to remove as an obstruction a house he had erected in an old public road. within the corporate limits of the town, and the town to keep this road open. At this place the proper authorities of the town had changed the road to a new location, and the acts of plaintiff's grantor, binding upon plaintiff, amounted to a dedication of the new road in substitution of the old one. This new road, at the time, affected only the land of plaintiff's grantor, who was also the grantor to the defendant of the land whereon the obstruction complained of was situated: *Held*, the fact that plaintiff's deed calls for the old road as a boundary was merely a matter of description, being copied from some old deeds made when conditions were different and did not amount to a rededication.

7. **Cities and Towns—Streets—Roads — Dedication — Ratification—Limitation of Actions—Evidence.**

The principle that an abandonment of a public way cannot be presumed, if at all, from nonuse, for any period short of twenty years, has no application where there has been a positive act of dedication and abandonment on the part of the owner, accepted and acquiesced in by the public.

APPEAL from *Joseph S. Adams, J.*, at Spring Term, 1910, of CHEROKEE.

The principal purpose of the action was to compel the individual defendants, Meroney and wife, to remove the building from an old road, formerly used as a public highway, causing an obstruction to same, etc., and to compel the town of Murphy to keep it open. Defendants denied the obstruction, denied that the road in question was a public way; claimed, further, that plaintiff on the facts in evidence had no right to relief. Issues were submitted and responded to by the jury as follows:

1. Are the plaintiffs the owners of the land described in the complaint? Answer: Yes.

2. Has the public an easement of a right of way for a public road over the land described in the complaint as the Turnpike Road? Answer: No.

3. Did A. L. Cooper, by his deed in trust to R. L. Cooper, dedicate the land described in the complaint as the Turnpike Road to the public as a roadway? Answer: No.

4. Did A. L. Cooper, by his deed in trust to R. L. Cooper, convey a right of way over the land described in the complaint as the Turnpike Road to R. L. Cooper, trustee, and his assigns? Answer: No.

Judgment on the verdict for defendant, and plaintiff excepted and appealed.

E. B. Norvell and Dillard & Bell for plaintiff.
W. M. Axley and Ben Posey for defendant.

HOKE, J. In this case there was evidence tending to show that there was formerly an old road through the town of Murphy, N. C., and that it entered the central portion of the town on a slight curve; that some years ago (12 to 18) the town commissioners, whether with or without legislative authority was not shown forth in evidence, altered a portion of this curve and substituted therefor a broad, commodious street, marked on the plat as Valley River Avenue and by which the central portion of the town was reached, this avenue being laid off and extended, the one portion at right angles with the other; that this new way, Valley River Avenue, has since been recognized by the authorities as being in lieu of the old road, and has been accepted by the public and is used by them as a satisfactory substitute for it. It further appeared in evidence that A. L. Cooper at the time owned the land on both sides of the curve where the change took place, and was the only abutting owner whose property was affected, and this property abutted on the new way; that he acquiesced in the change, fencing the property where the old road ran, building a barn in the road itself and since using the same as his private property, and that later he sold a portion of this land to defendant. The barn built by said Cooper having burned down, defendant improved the property, a part of such improvement being placed where Cooper's barn was, and later Cooper sold the remainder of the property to R. L. Cooper, trustee, who in turn sold and conveyed to plaintiff. At the time of this conveyance the land in question, contained in the deeds, was fenced in and claimed and owned as private property, and the Valley River Avenue was the public way recognized and used by the public instead of the old road. Upon these facts, and they have been so accepted by the jury, we are of opinion that plaintiff has shown no valid claim to the relief which he seeks, to wit, (1) that defendants Meroney and wife be required to remove the buildings from the old road; (2) that the defendant, the town of Murphy, be required to keep said streets at all times open, etc.

When a public highway enters an incorporated town, or such town builds up on one already existent, it usually follows that the highway, or so much of it as is within the corporate limits, comes under the regulation and control of the corporate authorities as a part of the public streets. Elliott on Streets and Roads, secs. 415 and 416. In the absence of constitutional restraint, these authorities may have power to vacate or discontinue a street or public way, but when such street has been once established they can only do so by legislative sanction expressly given or necessarily implied from powers which are so conferred, and then compensation must be made to abutting owners whose property is injured. *Moose v. Carson,* 104 N. C., 431; *Chair Co. v. Henderson,* 121 Ga., 399. When a change of this kind has been made by legislative authority, a landowner, as a rule, is restricted to a claim for damages, and after it has taken place, by the direction of the town government, with or without such authority, the change being recognized as valid and acquiesced in by the general public, its action cannot be questioned in a civil suit of a private citizen by reason of his position as a general taxpayer of the town. Such a suit can be maintained, if at all, only by a landowner whose property is affected by the change and which will suffer some peculiar and special injury by reason of it. *Trotter v. Franklin,* 146 N. C., p. 554; *Pedrick v. R. R.,* 143 N. C., 485; *Dodge v. R. R.,* 43 N. J. L., 354; *City v. Union Building Assn.,* 102 Ill., 379. From this, we think, it follows that when a litigant is precluded from bringing his suit, in the only position or right by which it could be successfully maintained, his action must necessarily fail. In the present case, at the time the old road was discontinued and Valley River Avenue substituted, A. L. Cooper owned the land on both sides of the old way, and so far as the evidence discloses, he was the only owner whose property was in any way affected. This property abutted on the new street, and A. L. Cooper not only made no protest, but he openly acquiesced in the change, fencing up the entire property and claiming and using it as his own. He even built his barn in the old road. So far as he was concerned, his conduct amounted to a dedication of the new for the old way, and while matters were in this shape he sold a portion of the land to defendant Meroney, who improved it, placing his building in the precise place where A. L. Cooper's barn had been, and the remaining portion was sold and conveyed to plaintiff, who bought, with full notice of existent conditions. Plaintiff's property was regarded and treated as a back lot when he bought it. The action of A. L. Cooper, his grantor, amounted to a dedication of the new for the old way, and he was undoubtedly precluded from maintaining such a suit as this, and plaintiff, who holds A. L. Cooper's title and can only proceed as such owner, should likewise be precluded. On the facts disclosed, there is high authority for the position that the public would be estopped from questioning the substitution of the new way for the old. *Brockhausen v. Bockland,* 137 Ill., 547; *Lyle v. Lesia,* 64 Mich., 16. But, however this may be, we are clearly of opinion that a private owner should not be heard to complain. This position is in no way affected by the fact that plaintiff's deed calls for the old road as one of the boundaries; the entire facts being fully known and the abandonment of the old and use of the new way being, at the time, recognized and acquiesced in by plaintiff's grantor and all others, the call of plaintiff's deed referred to was simply intended as a matter of description; it was only a copy from some of the old deeds, made when conditions were different, and did not amount to a rededication. *Church v. Dula,* 148 N. C., 262. There is nothing here said which militates in any way against the decision of *Crump v. Mims,* 64 N. C., 767, a case which only holds that an abandonment of a public way cannot be presumed, if at all, from nonuser, for any period short of twenty years—a position which has no application where the evidence shows a positive act of dedication and abandonment on the part of the owner, accepted and acquiesced in by the public, a distinction recognized in that case and repeatedly affirmed with us. *Tise v. Whitaker,* 146 N. C., 374. There is no error, and the judgment will be affirmed.

No error.

IN RE TINNER HOLLEY.

(Filed 23 December, 1910.)

1. **Habeas Corpus—Children—Appeal and Error—Procedure.**
Except in cases concerning the care and custody of children, there is no appeal from a judgment in *habeas corpus* proceedings. Revisal, sec. 1854.

2. **Habeas Corpus—Supreme Court—Certiorari—Review—Procedure —Constitutional Law.**
In *habeas corpus* proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the Constitution, Art. IV, sec. 8, under the power given to this Court "to issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts."

3. **Same—Appeal and Error.**
The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in *habeas corpus* proceedings in matters not involving the care and custody of

children, Constitution, Art. IV, sec. 8, shall only be exercised by *certiorari*, and the jurisdiction cannot be acquired by appeal upon exception and error assigned.

4. **Habeas Corpus—Certiorari—Supreme Court—Review—Record—Final Judgment—Evidence—Interpretation of Statutes.**

In *habeas corpus* proceedings, where it appears from the application for *certiorari* in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court; and when such fact is disclosed on the hearing, the petition must be remanded. Revisal, sec. 1822 (2), 1827, 1848 (2).

5. **Same—"Final Judgment"—Definition—Words and Phrases.**

The term "final judgment or decree of a competent tribunal" wherein the Supreme Court will not issue a *certiorari* to review a judgment entered in *habeas corpus* proceedings, refers only to judgments authorized by the law applicable to the case in hand; and when it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the same and was manifestly without power to enter the judgment or to impose the sentence in question, there is no final sentence of a competent tribunal.

6. **Habeas Corpus—Certiorari—Supreme Court—"Competent Jurisdiction"—Definition—Words and Phrases—Interpretation of Statutes—Constitutional Law.**

The term, "competent jurisdiction," used by the Revisal, sec. 1822, in making an exception to the power of this Court to review a judgment in *habeas corpus* proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional.

7. **Habeas Corpus—Supreme Court—Certiorari—Jurisdiction—Value of Goods Stolen—Sentence—Burden of Proof—Indictment—"Aggravation"—"Hardened Offender"—Interpretation of Statutes.**

It appeared in the record in this case that defendant, suing out a *certiorari* in the Supreme Court in *habeas corpus* proceedings, was sentenced for a term of five years, of which he has served eighteen months; that he had been indicted for stealing goods to the value of $10; that theretofore he had, on separate occasions, been convicted for shooting a man, for retailing, and for larceny, in all of which judgment was suspended, but all of them had gone off the docket; that in the present proceedings the judgment cited the former convictions and that it had been made to appear that the stolen goods were worth between $250 and $300. It was contended by petitioner that under our statutes, Revisal, secs. 3500, 3506, a sentence for more than one year is illegal: *Held,* (1) the amount alleged in the bill of indictment (here $10) is not conclusive on the question of punishment; (2) the amount or value of the stolen property is not now an essential ingredient of the crime of larceny, and it is only a matter of amelioration of the punishment, to be raised and determined at the instance of defendant as an issue of fact on the trial; and therefore there is no indication on this record and judgment that the sentence was not within the power of the court that imposed it; (3) that the record and judgment showed a case "of much aggravation or of hardened offenders," where, in the discretion of the court, a sentence not exceeding ten years may be imposed.

8. Larceny, Petty—Punishment—Interpretation of Statutes.

At common law petty larceny was regarded as an infamous offense and subject to corporal punishment; and except as modified by Revisal, secs. 3500, 3506, the punishment would, in all cases, be imprisonment for not less than four months nor more than ten years. Revisal, secs. 3292, 3293.

CERTIORARI to review proceedings from GUILFORD in *habeas corpus,* heard before *Associate Justice Walker,* at chambers, in Raleigh, on December 12, 1910.

On the hearing it was made to appear: That at June Term, 1909, in the criminal court of Guilford County, the petitioner was tried and convicted upon an ordinary indictment for larceny of some clothing from the Southern Railway Company, and in which indictment the value of the goods stolen was alleged to have been $10, certified copy of said indictment, No. 131, being set out in the petition for writ of *habeas corpus* hereunto attached. In pronouncing sentence for this offense the following record was made by his Honor, *Judge B. F. Long:*

"It having been made to appear in this case that the goods stolen were worth between $250 and $300, and the defendant, Tinner Holley, having been convicted in No. 10 of shooting a man and in No. 97 of retailing, and in No. 100 of larceny, on this docket, it is adjudged by the court that the defendant be imprisoned in the county jail for a term of five years and assigned to work during imprisonment on the public roads of Guilford County."

Judgment was suspended in No. 10 for shooting a man, in 97 for retailing, and in No. 100 for larceny; but all of these cases have gone off the docket, and neither these cases nor any others are on the criminal docket of Guilford County against the petitioner, as appears from the record hereunto attached. At the conclusion of the June Term, 1909, of the criminal court, the petitioner began the service of his term upon the roads of Guilford County, and from that time until now petitioner has been and still is upon the roads of Guilford County, except for the last month, when he has been removed to the Guilford County jail on account of illness.

Upon these facts there was judgment that the prisoner be not discharged, and he was thereupon remanded and is now held in custody under the sentence. Thereupon a writ of *certiorari* was issued from this Court, in review of the proceedings and judgment, formal application therefor having been duly waived.

Attorney-General for plaintiff.
Stern & Stern and Hudson & Swift for defendant.

HOKE, J., after stating the case: Our statute law has made no provision for appeal from a judgment in *habeas corpus* proceedings, except in cases concerning the care and custody of children. Revisal, sec. 1854. Therefore it is, that when on such a hearing a question of law or legal inference is presented, and the judgment therein involves the denial of a legal right, it may be reviewed by *certiorari,* under and by virtue of the power conferred on this Court by the last clause of section 8, Article IV, of our Constitution: "And the court shall have power to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts." This has been expressly held with us in several decisions, as in *S. v. Herndon,* 107 N. C., 934; *S. v. Miller,* 97 N. C., 451; *S. v. Lawrence,* 81 N. C., 522, and the procedure in the present case has been very properly made to conform to this ruling. The cause, then, being regularly before us, our statute on *habeas corpus* contains, among others, the following provisions, as more directly relevant to the question presented:

"Sec. 1822. Application to prosecute the writ shall be denied in the following cases (subsec. 2): Where persons are committed or detained by virtue of the final order, judgment, or decree of a competent tribunal of civil or criminal jurisdiction or by virtue of an execution issued upon such final order, judgment, or decree, etc."

"Sec. 1827. Any court or judge, empowered to grant the writ, to whom such application may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended, is by this chapter prohibited from prosecuting the writ."

"Sec. 1848. It shall be the duty of the court or judge forthwith to remand the party, if it appear that he is detained in custody, either . . . (subsec. 2): By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction or of execution issued upon such judgment or decree."

A perusal of these sections quoted will show that where it appears from the application itself or the documents annexed thereto, that the petitioner is held under a final judgment of a competent tribunal, the writ will be denied, and when such fact is disclosed on the hearing, the petitioner must be remanded. In construing this term, "final judgment or decree of a competent tribunal," it has come to be well understood that the exception refers only to judgments warranted by the law applicable to the case in hand, and where it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the cause and was manifestly without power to enter the judgment or impose the sentence in question, in such case there would be no final sentence of a competent tribunal, and the exception established by the statute does not obtain. *S. v. Queen,* 91 N. C., 659; *People v. Lipscomb,* 60 N. Y., 559; *In re Swan,* 150 U. S., 637; *Ex parte Lange,* 85 U. S., 163; *In re Lackey,* 6 S. Dakota, 526. To hold otherwise would in effect subject this great writ—the most important, perhaps, in our system of government, having its origin long prior to Magna Charta—to a question of form and procedure and render it of little avail for the relief of a citizen imprisoned contrary to the law of the land. The lawmakers no doubt had this interpretation in view when they used the words "competent tribunal," and if they had intended otherwise the provision would have been unconstitutional, for the writ of *habeas corpus,* as understood and acted on, has prominent place in our organic law. Article I, section 18. In recognition of this principle, it has been frequently held that where a convicted criminal is detained under a sentence not authorized by law, he is entitled to be heard, and when, though authorized in kind, it extends in duration beyond what the law expressly permits, after serving the lawful portion of the sentence, he may be relieved from further punishment, the excess being considered and dealt with as void. *U. S. v. Pridgeon,* 153 U. S., 48; *Ex parte Erdman,* 88 Cal., 579.

While the right to relief in the cases indicated is clear, it is well recognized that in a hearing on *habeas corpus* in the proper acceptation of the term, the court is not permitted to act as one of errors and appeals, but the right to afford relief arises only when there is manifestly a lack of power to impose the sentence complained of. As held in *Pridgeon's case, supra,* "Upon a writ of *habeas corpus* the inquiry is not addressed to errors, but to the question whether the proceedings and judgment are nullities, and unless it appears that the judgment or sentence under which the prisoner is confined is void, he is not entitled to his discharge; and in *People v. Lipscomb, supra, Allen, J.,* delivering the principal opinion, said: "If there was no legal power to enter the judgment or decree or issue the process, there was no competent court, and consequently no judgment or process. All is *coram non judice* and void." And again, "In other words, upon the writ of *habeas corpus* the court could not go behind the judgment, but upon the whole record the question was whether the judgment was warranted by the law and within the jurisdiction of the court." Except in the exercise of appellate power of some supervising tribunal, this position is uniformly observed. It would produce inextricable confusion to permit one judge of equal and concurrent jurisdiction to question and interfere with the final judgments of another or to deal with such hearings on any other principle. And in determining this question of power the Court is confined, as heretofore stated, to the record proper and the judgment itself. It is not permitted that the testimony or the rulings thereon should be examined into nor that matters fairly in the discretion of the presiding judge should be reviewed or that judgments erroneous in the ordinary acceptation of the term should be questioned. The hearing is confined to the record, and judgment and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere. *Ex parte McCown,* 139 N. C., 95; *In re Schenck,* 74 N. C., 607; *In re Swan,* 150 U. S., 637; *In re Coy,* 127 N. C., 731.

Applying the principle, and under our decisions directly relevant to the charge contained in the bill of indictment, the judgment of *Associate Justice Walker* remanding the prisoner was clearly correct. Our statutes applicable to the punishment for larceny and controlling on the question presented are as follows: Section 3500: "All distinctions between petit and grand larceny, where the same hath had the benefit of clergy, is abolished, and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is: *Provided,* that in cases of much aggravation or of hardened offenders, the court may, in its discretion, sentence the offender to the State's Prison for a period not exceeding ten years." And section 3506: "In all cases of larceny, where the value of the property stolen does not exceed $20, the punishment shall, for the first offense, not exceed imprisonment in the State's Prison or common jail for a longer term than one year. If the larceny is from the person or from the dwelling by breaking and entering in the daytime, this section shall have no application. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen." Construing the last section, the Court in *S. v. Harris,* 119 N. C., 811, held as follows:

1. The act of 1895 (chapter 285) does not make it necessary that an indictment for the larceny of a sum less than $20 should charge the taking from the person or from a dwelling-house in the daytime.

2. The general rule as to the form of statutory indictments is that it is not requisite, where they are drawn under one section of the act, to negative an exception contained in a subsequent distinct section of the same statute.

3. On a trial for larceny in the Superior Court the fact that the amount stolen was less than $20, and that the taking was neither from the person nor a dwelling-house, is a matter of defense which it is incumbent on the defendant to show in diminution of the sentence.

4. Where, in the trial of an indictment for larceny, there is a dispute about the value of a thing taken, it is incumbent on the defendant to demand a finding upon that subject by the jury.

It will thus appear that the amount or value of the property is not now an essential ingredient of the crime of larceny in this State, nor does the statement of such value in the bill conclude on the question of punishment. It is only a matter in amelioration of the punishment, to be raised and determined at the instance of the defendant and as an issue of fact, and therefore there is no indication on this record and judgment that the sentence was not within the power of the court that imposed it. Apart from this, petit larceny at common law was regarded as infamous and subject to corporal punishment. *S. v. Kent,* 65 N. C., 311; *S. v. Ratts,* 63 N. C., 503; *S. v. Kearzey,* 61 N. C., 481; Battle's Revisal, ch. 32, sec. 29, and except as modified by the sections quoted, the punishment would, in all cases, be not less than four months nor more than ten years. Revisal, secs. 3292, 3293. Referring the question of punishment, however, to the sections more directly apposite, 3500 and 3506, it is evident that the last section, 3506, was only designed and intended to apply to petty offenders and to first or early offenses, and, when taken in connection with the proviso in section 3500, "*Provided,* that in aggravated cases or of hardened offenders the court may, in its discretion, sentence the offender to the State's Prison for not less than four months nor more than ten years" (changed to roads by statutes applicable), we think, even if it were a question now open to investigation, that on the facts as found by the court the sentence imposed on the prisoner was fully warranted by law. This position finds substantial approval in the recent case of *S. v. Shuford,* 152 N. C., 809, in which *Associate Justice Walker,* in closing the opinion, said: "We think it would be giving a strained construction to section 3506 if we should hold that a larceny committed by breaking and entering a dwelling-house in the night-time cannot be punished by imprisonment for more than one year, and that larceny from the person, or by breaking and entering in the daytime may be punished by a much longer imprisonment. Revisal, sec. 3500, provides in regard to the punishment of larceny, that in cases of aggravation or of hardened offenders, the court may, in its discretion, sentence the offender to the State's Prison for a period not exceeding ten years."

Nor is it in conflict with the decision of the Court in *S. v. Davidson,* 124 N. C., 839, to which we were cited by counsel. In that case the value of the property stolen was less than $20, and, on the facts, in order to sustain a sentence greater than imprisonment for one year, it was necessary to show a former conviction for a like offense, and it was held that in such case it was necessary that the former conviction should be alleged in the bill of indictment and proved on the trial. That ruling was in accord with a line of precedents made at a time when a conviction for a second offense, in many cases, changed and greatly increased the character of the punishment, some of them requiring the imposition of the death penalty, and the fact that the principle indicated was recognized by statute (Revisal, sec. 3249, Code, sec. 1187) was allowed much weight. We think, however, that the case as a precedent should be confined to the facts there presented and should not apply or be allowed to control where, as in this case, it clearly appeared that the property was largely more than $20 in value, to wit, from $250 to

$300, and that the defendant was a "hardened offender," bringing the question of punishment within the provisions of section 3500 of the Revisal.

There is no error, and the judgment is

Affirmed.

MANNING, J., dissenting: I concur in the opinion of the majority of the Court, that the petitioner has invoked the proper remedy to have the legality of his imprisonment inquired into. Upon a bill of indictment charging the petitioner with the larceny of goods and merchandise of the value of less than $20, the petitioner was tried and convicted. The judge sentenced him to serve a term of five years on the public roads of Guilford County. He prosecuted no appeal from that judgment, and before seeking his discharge from the punishment, in excess of 12 months, he, after having served a term of 18 months, applied to this Court for the writ of *certiorari* in the nature of and as a substitute for an appeal. This Court denied him relief by this writ. The petitioner then sued out the writ of *habeas corpus*; and the legality of the sentence pronounced upon him by *Judge Long* is the only matter of inquiry. It seems to me this Court, in *Davidson's case*, 124 N. C., 839, has determined that the petitioner is entitled to his discharge. In that case the Court said: "The Code, sec. 1187 (Revisal, sec. 3249), prescribes that when a second conviction is punished with other or greater punishment than for a first conviction, the first conviction shall be charged in the manner therein set out, and what proof shall be sufficient evidence thereof. When the property stolen is charged of less value than $20 (or when charged at more than that value, if it is found by the jury to be of less value than $20) no punishment greater than one year's imprisonment can be inflicted, unless it is charged in the indictment that the defendant has been formerly convicted of larceny, except that, should the proof show that the larceny was from the person or breaking and entering a dwelling-house in the daytime, the defendant cannot claim the protection of this statute, and hence it is not necessary to charge in the indictment the manner of the larceny."

In the present case the larceny was not committed in one of the excepted ways, *i. e.,* from the person or by breaking and entering a dwelling-house in the daytime. His Honor does not make any such finding, nor does he base his judgment upon any such fact. His judgment is rested upon a finding of the value of the stolen property to be in excess of $20 (and this finding is made by the judge and not by the jury), and upon the conviction of the petitioner of other offenses at the same term of the court. The omission of the indictment to charge the conviction of a previous larceny would prevent a punishment based upon a second conviction. *S. v. Davidson, supra;* Revisal, sec. 3249. As the indictment charged the value of the stolen property to be less than $20, why should the defendant ask for a finding by the jury that this allegation of the State was untrue? The value of the stolen property was not involved; the State in the indictment fixed it; the defendant asked no finding to confirm what the State alleged or to enhance the value of the stolen property, so as, if convicted, to increase his punishment. I cannot believe the Legislature intended any such result. It is undoubtedly true that, under the statute, the value of the stolen property does not change the character of the crime; it is as much larceny to steal property of the value of $5 as it is to steal property of the value of $20 or more. The Legislature has, however, deemed it wise to make the punishment upon conviction determinable by the value of the stolen property; and it had the unquestioned power to do so.

This decision is the more important for it is not clear what effect it may have upon the acts establishing inferior criminal courts for certain cities, towns, and counties in the State, in which the larceny of goods of the value of less than $10 is made a petty misdemeanor. Under these acts, which have been sustained by several decisions of this Court, the value of the stolen property determines not only the punishment that can be legally inflicted, but also the grade of the crime. The Legislature, in passing the act in 1895, incorporated a provision which enabled the defendant to call in question the value of the stolen property as charged in the indictment; but this was obviously done for the benefit of the the defendant where the value was charged to be in excess of $20. In that case the defendant, if he controvert the value, may have the jury (not the judge) determine as a fact, and so find, the value of the property. In my opinion, the petitioner, having served the maximum punishment prescribed by the statute, should be discharged.

WALKER, J., did not sit on the hearing of this appeal.

MARY WALSH ET AL. v. ZEB. BURLESON ET AL.

(Filed 14 December, 1910.)

1. **Appeal and Error—Original Transcript—Filing—Requisites.**
   A motion for *certiorari* based upon allegation that the judge had not settled the case on appeal, without laches on the part of appellant, will not ordinarily be granted when the appellant has not caused to be docketed the transcript of the record proper as the foundation for the motion.

2. **Same—Excusable Neglect—Clerk's Fees—Undertaking—Settled by Judge.**
   The right to appeal is not an absolute right, for the appellant must comply with the conditions prescribed for its prosecution; and when he seeks to excuse his laches in not having the original transcript filed "by reason of lost papers, or for any other good cause," alleging that the judge had the papers and had not duly settled the case, and it appears by affidavit of the clerk and judge and others that the papers had been permitted to remain in the clerk's office without payment to him of his fees or filing an appeal bond, the appeal will be dismissed.

APPEAL by defendants from *Pell, J.*, at the April Term, 1910, of MITCHELL.

On motion of defendants to recall writ of *certiorari* and to dismiss the appeal.

A. C. Avery for plaintiffs.

S. J. Ervin, W. C. Newland, and M. L. Wilson for defendants.

PER CURIAM. This action was tried at July Term, 1910, of Mitchell. When the district to which it belongs was reached at this term, the appellant moved for a *certiorari* because the case on appeal had not been settled by the judge without any laches on the part of the appellant.

The uniform holding of this Court has been that a *certiorari* will not be granted in such case unless the appellant has docketed the transcript of the record proper as the foundation of the motion. *S. v. Freeman,* 114 N. C., 872; *Haynes v. Coward,* 116 N. C., 840; *Brown v. House,* 119 N. C., 622; *Shober v. Wheeler, ib.,* 471; *Guano Co. v. Hicks,* 120 N. C., 29; *Burrell v. Hughes,* 120 N. C., 277; *Norwood v. Pratt,* 124 N. C., 745; *Worth v. Wilmington,* 131 N. C., 532; *S. v. Telfair,* 139 N. C., 555; *Slocumb v. Construction Co.,* 142 N. C., 350; *Pittman v. Kimberly,* 92 N. C., 562, and numerous other cases. In *Burrell v. Hughes,* 120 N. C., 279, the Court said: "There are *some* matters at least which should be deemed settled, and this is one of them." That case cites many others, and has often been cited and approved since.

The only exception to the requirement that a transcript of the record proper must be docketed, as a basis for a *certiorari,* is that when "By reason of the loss of papers, or for any other good cause, the transcript of no part of the record can be docketed at the first term of the Supreme Court following the trial below, that fact should appear by affidavit and a *certiorari* asked for, supplemented by a motion below to supply the papers." *Parker v. R. R.,* 121 N. C., 501, and numerous cases there cited; *Norwood v. Pratt,* 124 N. C., 747. The mover for the *certiorari* in this case filed an affidavit "on information and belief," the case being from another county, as an excuse for failure to procure the record proper, that the papers in the cause had been in the hands of the judge, and hence a transcript thereof could not be had from the clerk. Upon the issuance of the *certiorari,* the appellee's counsel promptly moved to recall the writ, setting forth that no notice had been issued to him that the *certiorari* would be asked for; that he had notified appellant's counsel that if such motion were made he would oppose it because no transcript of the record proper had been certified to this Court, and, further, that the papers in the cause had remained in the clerk's office all the time, and were still there, and that no appeal bond had been executed. The clerk of the court returned to the *certiorari* that all the records in the case had remained in his office ever since the trial, that no fees had ever been paid him for a transcript of the record, nor had any request been made by appellant that he should certify the record proper to the Supreme Court, nor has any appeal bond been given or filed in his office. The judge himself certifies that the papers in the cause had never been in his hands and that he had not settled the case on appeal, but had been forced to delay settlement by reason of not having received said papers. It appears from this that the appellant is without any excuse for not having filed a transcript of the record proper in this Court; that he did not give the appeal bond, and that the delay in settling the case was owing to his not having sent the papers to the judge.

Under these circumstances, the motion of the appellee to dismiss the appeal must be granted. It can make no difference that the case on appeal may have since been settled by the judge. The right to appeal is not an absolute right, but the appellant must comply with conditions, upon which an appeal can be prosecuted. Appellees have rights which must be respected. To permit the case to be docketed now would delay the appellant six months in the argument of his case. A delay of justice may be, and often is, a denial of justice. The appellant did not docket the record in time, and the motion of the appellee to dismiss must be allowed.

Appeal dismissed.

STATE v. THE COLONIAL CLUB.

(Filed 14 December, 1910.)

1. **Spirituous Liquors—Penalty Statutes—Construction.**

The statute prohibiting the sale of spirituous, etc., liquors is a penal one, strictly to be construed, and the meaning of the words employed of "precise legal import, both at law and in equity," will not be extended to include an unexpressed but presumed intention of the Legislature.

2. **Same—"Sale"—Intent.**

The words "sale" or "sell," used in the general prohibition law, have a well-known legal signification, and in the absence of anything to the contrary appearing in the statute, that signification is assumed to be the one intended.

3. **Same—Consideration.**

In order to constitute a sale within the meaning of the general prohibition law, there must be a transfer upon a valuable consideration of the absolute or general property in the spirituous liquor alleged to have been sold contrary to law.

4. **Same—Interpretation of Statutes—Gratuitous Bailee—Commingling of Goods—Principal and Agent—Special Verdict—Intent.**

Upon the trial of the defendant club for the sale of spirituous liquor contrary to the general prohibition law, it appears by special verdict that, under an existing arrangement for all members, one of its members made an order for beer in bottles on a dealer beyond the State, directing that it be shipped to him in care of the defendant, handing the steward of the club the amount of the order in money, and which the club remitted the dealer by its check on its bank account. The beer was received by the manager of the club and commingled with the bottled beer of other members, and furnished to the member according to a general system of checking used by the club, until the number of bottles ordered was gone. The club did not solicit these orders: *Held*, (1) under this arrangement the title to the beer did not vest in the club; (2) ordering the beer from beyond the State was not an illegal act, the club acting as the agent of the member and the title to the beer did not vest in the club (Rev., sec. 3534); (3) the club rendering the service without compensation was a gratuitous bailee, having only a qualified interest, and the fact that the bottles of beer of one member were commingled with those of the others kept by the club as such, did not render the transaction a sale; (4) the facts in this case did not constitute the club the agent of the vendor in another State; (5) as the special verdict did not find the intent, its existence may not be presumed by the court.

CLARK, C. J., and HOKE, J., dissenting.

APPEAL from *Long, J.*, at September Term, 1910, of MECKLENBURG.

The indictment of defendant contains three counts, to wit:

First Count. That the defendant solicited orders for intoxicating liquors within the borders of Mecklenburg County, contrary to law.

Second Count. That the defendant sold and retailed spirituous and malt liquors to some person to the jurors unknown.

Third Count. That the defendant kept on hand for sale more than 2½ gallons of spirituous liquors in the county of Mecklenburg, contrary to law.

The defendant pleaded not guilty. The jury rendered the following special verdict:

"The Colonial Club is a corporation duly created and organized under the laws of the State of North Carolina, the charter of said club being dated 22 June, 1904, a copy of which charter is hereto attached, and a copy of the by-laws of the said club is hereto attached; that said club has its club-rooms in a commodious building at the corner of North Tryon and East Fifth streets, in the city of Charlotte, N. C. There are 180 members of said club; the initiation fee is $10 and the quarterly dues $6; nobody but men can join the club, and they must be over 21 years of age. That said club has a manager who stays at said club-rooms most all his time, and also has a president and board of directors and treasurer. That said club keeps on hand a book, with order blanks for lager-beer, a copy of which is hereto attached. The order blank has a stub and corresponds with the number on the order; said stub is kept by the club, and when an order is made a memorandum is made on the same number as the order blank is on the stub, showing substantially the same as on the order blank, a copy of which stub is hereto attached. These books, with the order blanks, are paid for by the club, but no officer of the club actually solicits a member to make the order. When the order is made by the member of the club, the money for the order is given to the manager of the club, and the manager turns the money over to the treasurer of the club. The treasurer of the club has a banking account, in which he banks the money received by him and sends the order on the liquor house, with the check of the club for the amount received from the member, and the liquor is sent to the member in care of the club; that the club makes no charges to the members and gets no profits out of the transaction. That at the time the beer was received by the club (if the order was for beer), the manager would give the member a book, with the same number on it as was on the order blank and on the stub, and if the order was for 12 dozen bottles of beer, the book would contain 12 dozen separate coupons. A copy of the kind of book issued is hereto attached. That the manager of the club kept and keeps a system of refrigerators, in which all the beers are mixed with beer of other members of the club. If the club member wants a bottle of beer for himself and a friend, he hands the book, a copy of which is hereto attached, to the steward of the club, who would tear out as many coupons as bottles of beer ordered, and deliver to such member the number of such bottles of beer ordered, getting them out of the refrigerators where it was mixed with the other beer of the other members of the club. That the liquor ordered by this club is only beer, and orders were sent out of the State of North Carolina. That this system of ordering and delivering lager-beer was at times hereinafter mentioned and at the time of finding this indictment carried on at the club's rooms in the city of Charlotte by its manager and treasurer, under the directions of said club. That following these regulations of the club, one of its members, a person to the jurors unknown, went to the club-rooms in the city of Charlotte, on the .... day of ...., 1910, paid the club's manager the sum of $8.50 and asked the manager to fill out one of the order blanks for 10 dozen pint bottles of lager-beer and forward same to a liquor house (a person to the jurors unknown) in Richmond, Va., to be filled, which was done accordingly, and the club's check was also sent to the liquor house for the amount of the order, and the said beer was shipped by the liquor house to the member in Charlotte in care of the club, arriving on the .... day of ...., 1910, was at once taken charge of by the manager and put in the refrigerators and mingled with the beer of other members, and on the same day and for some days thereafter said club manager delivered bottles of lager-beer to said member out of the club's refrigerators, received from said member beer coupons in accordance with the club's regulations, and on until the member had received 10 dozen pint bottles of lager-beer as a beverage, all of which was willfully done in the city of Charlotte in prohibition territory; neither the club nor its manager having at any time any license to sell lager-beer, and that said club was not the agent of said liquor house from whom the beer was ordered any further than the foregoing facts may as a matter of law make it the agent, and that the club received no profit for its connection with the transaction.

"The jury for their special verdict say:

"We find the foregoing facts; and if on said facts the court is of the opinion that the defendant is guilty, then we find the defendant guilty as charged in the bill; and if the court be of the opinion that the defendant is not guilty upon such findings, then we find the defendant not guilty."

The following is a copy of the ticket given to the member upon receipt at the club of the beer:

Bohemian.
C. C. No. 16798.
Deliver one of the lot held for me.
No. ....

And the following is the copy of the order blank referred to in the special verdict:

No. 3369.
To ....
Order ....
Ordered by ....

No. 3369, Charlotte, N. C., ...19....
Mess. ....
GENTLEMEN: Please ship me by .... as follows:
....
Ship care The Colonial Club. Yours truly,
....

Upon the special verdict the court adjudged the defendant guilty, and imposed a fine of $500, and from its judgment the defendant appealed.

Attorney-General Bickett, George L. Jones, and Clarkson & Duls for the State.

Cameron Morrison for defendant.

MANNING, J. Chapter 71, Public Laws of 1908, the State-wide prohibition act, having been approved by a majority of the voters of the State at the special election held therefor, it is now unlawful for any person or persons, firm or corporation, to manufacture or in any manner make or sell or otherwise dispose of for gain, at any place within the State, any spirituous, vinous, fermented or malt liquors or intoxicating bitters.

In the disposition of this appeal we are not concerned with the manufacture or in any manner the making of the prohibited liquors. The special verdict presents the question whether the facts found constitute a sale by the defendant or an otherwise disposition of the beer for gain. The words "sale" or "sell" have a well-known legal signification, and in the absence of anything to the contrary appearing in the statute, we must assume that they were here intended to have that signification. This is a generally accepted rule of statutory construction. Black on Intoxicating Liquors, secs. 403, 406; *Patterson v. Galliher,* 122 N. C., 511; *Adams v. Turrentine,* 30 N. C., 147; *S. v. Gupton,* 30 N. C., 271; *S. v. Barco,* 150 N. C., 792; 36 Cyc., 1114. The word sale is thus defined: "A sale is a transmutation of property from one man to another in consideration of some price or recompense in value." 2 Blk. Com., 446. "It is a transfer of the absolute or general property in a thing for a price in money." Benj. Sales, sec. 1. "A sale is the passing of the title and possession of any property for money which the buyer pays or promises to pay." *Konavek v. State,* 38 Tex. Crim. Rep., 44, 41 S. W., 612; *S. v. Law and Order Club* (Ill.), 62 L. R. A., 884; 7 Words and Phrases Judicially Defined, 6291 and 6292. In *S. v. McMinn,* 83 N. C., 668, an indictment for retailing without license, *Judge Dillard,* speaking for this Court, said: "A sale is the transmutation of the property in a personal chattel from one to another on a *quid pro quo,* paid or agreed to be paid, and such a change of property in the retail of spirituous liquors by the small measure is usually effected by the delivery of the article and the payment of the price simultaneously; but it may be made in other modes. . . . To constitute a sale under the statute against retailing, there is no necessity for a manual separation and delivery of the parcel by the retailer to the customer, but it will be a delivery sufficient in law if the keg, decanter, or other vessel be so placed or prepared as that the customers can or may, with the consent of the owner, draw for himself; and so, likewise, the price paid in completing the sale need not be paid into the hands of the proprietor, but it will be equivalent if it be deposited for him in a place of his appointment." *S. v. Kirkham,* 23 N. C., 384; *S. v. Bell,* 47 N. C., 337; *S. v. Simmons,* 66 N. C., 622; *S. v. Poteet,* 86 N. C., 612; *S. v. Taylor,* 89 N. C., 577; 1 Mechem on Sales, sec. 1. This learned writer says in section 1: "The essential elements here involved are that there must be (1) a transfer, of (2) the general or absolute title, to (3) a specific chattel, for (4) a price in money or a consideration estimated in money. Sale is preëminently the transfer of the title." Again: "Sale means, moreover, the transfer of the absolute or general title. There may be other transfers, of limited interests, such as the right of possession or some specific property in or lien upon the goods; but these, as will be seen, do not constitute a sale." So that, to constitute a sale, it being necessary that the facts found should prove a transfer of the absolute or general property in the chattel, we think they fail in this case to show this essential element; and we think, also, there was an entire failure to show that the transfer was for any consideration whatever, presently delivered or promised. If there was no general or absolute property in the beer transferred to the defendant, there was no transmutation of title. Nor was it the agency selected to work a change of title. We must have due regard to the fact that we are construing a penal statute and the rule of strict construction applicable to such statutes; nor do we feel warranted in extending the meaning of a word of "precise legal import, both at law and in equity," to reach an unexpressed but presumed intention of the Legislature. The defendant, as the depository of the beer ordered by the member of the club unknown to the jurors, who ordered the beer and had it delivered in his name and for his use to the defendant, was acting solely as the servant, agent, or bailee without hire for such member. The member made the order in his own name, specified the quality and quantity, directed it to be shipped to him in care of the defendant; the firm or person to whom the order was sent lived beyond the State; the beer was shipped as directed, addressed to the person ordering it at Charlotte, and was delivered as directed, at defendant's club-house. When or how did the title become vested in the defendant? What right of property did it have in it, and when and by what act? The delivery to defendant for the person ordering and in his name could certainly vest in it no right of property. Could any creditor of the club have seized it under execution, as the property of the club? If so, when did the ownership and title of the person who ordered it, paid for it, and to whom it was shipped, cease, and by what process known to the law was there a transmutation of his title? "The laws of this State have thus far not made the purchase of whiskey a criminal offense, when it is bought by the purchaser himself and for his own use. To bring one who procures whiskey for another under this statute (section 3534, Revisal) it will be noted that the sale by which it was procured must be illegal, and the law does not apply to cases where the sale is not illegal, or where our State legislation on the subject cannot apply to and affect the transaction. Such cases are not within the purview of the section referred to, Revisal, sec. 3534, but, as to them, the general doctrine obtains, that in sale of whiskey, where one acts entirely as agent of the buyer, having no interest in the whiskey, and taking no part in the sale as vendor, nor as his agent or employee, such person is not indictable under the laws controlling the subject, as they now stand. *S. v. Smith,* 117 N. C., 809." *S. v. Whisenant,* 149 N. C., 515.

The *rationale* of this decision is obvious; my own agent is not a vendor to me when he executes my order to buy as I direct, and delivers the property so authorized to be bought to me; he is but my representative, there is no sale by him to me. The mere forwarding its member's money by its own check to the nonresident vendor was not an illegal act, nor did it vest the title to the beer in the defendant. In *Lockyear's case,* 95 N. C., 633, the liquor furnished the members of the club (a corporation duly organized under the laws of this State) was purchased by and in the name of the corporation; the title to it was in the corporation, and when the corporation transferred any of it to a member or stockholder, every element essential to constitute a sale was present. While, ordinarily, to constitute a sale (as in the case of every simple contract) a consideration is necessary, the facts determinative of the transaction as a sale do not depend upon the adequacy of the consideration, and the fact, as in the *Lockyear case,* that the liquor was furnished at cost did not relieve the transaction from being a sale. So in *Neis' case,* 108 N. C., 787, a case resembling, but upon the facts easily distinguishable from, the present case, the defendant (as steward of the club) held the liquors for the several members, not in separate jugs or other vessels for each, but commingled in the same jugs and vessels, and received from each member the price of the liquor delivered to him as he wished at the rate of 10 cents per drink, and with the money so paid him he replenished the stock with other liquors and sold of them indiscriminately to the contributing members at the stated price. It is clear, therefore, that the purchasing member did not have the sole property in the whiskey delivered to him, and that the sum paid was the price, at least, of the interest of the others in it, and that the defendant was the agent authorized to make the sale and receive the price; and this being done in territory where a sale was prohibited, it was violation of law. So this Court said: "Before the transaction, the money was solely his and the liquor belonged to several.

By virtue of the transaction, and in exchange for the money, the liquor became his sole and separate property. This is surely a sale. It has every element of a sale."

In *S. v. Bell,* 47 N. C., 337, the Court, in defining what constituted a sale by the small measure under the statute prohibiting the retailing of spirituous liquors "by the small measure, that is to say, in quantities less than a quart, without license," said: "In the case of *S. v. Kirkham,* 23 N. C., 384, the Court said if the contract between the parties had been that the seller should deliver a quart of spirits, *which particular quart* should thereupon become the property of the purchaser, although the seller, by agreement, was to retain it *for the purchaser,* so as to be used by the latter, from time to time, as he might require, we suppose that such a contract (unless, perhaps, it were found by the jury that there was an intent thereby to evade the statute) must have been held to be a contract for the sale of a quart. In the case now under consideration the particular quart became the property of the purchaser upon the price being paid; it was placed in a decanter separate from the rest of the spirits, to be used by the purchaser at his pleasure, and he might at any time have taken away the whole without the consent of the seller, and either carried it home or deposited it elsewhere."

So in the present case we think it was competent for the particular member of the club referred to in the special verdict to have taken away the bottles of beer ordered and received by him, and either carried them home or deposited them elsewhere. It was in separate bottles from that ordered by others, and it may have been of a different brand or even of the same brand. We think the facts found in the special verdict expressly negative an intent to evade the statute, unless the facts themselves, as found therein, independent of any actual intent, determine the guilt of the defendant.

It must be further observed, in the consideration of this case, that we are dealing with a special verdict and not a general verdict. In the case of a special verdict we have held that "The Court is confined to the facts found, and is not at liberty to infer anything not directly found." *S. v. McCloud,* 151 N. C., 730; *S. v. Custer,* 65 N. C., 339; *S. v. Hanner,* 143 N. C., 632.

In the case of a general verdict of guilty, many presumptions arise which do not in a special verdict. If intent is a necessary element of the crime, and a special verdict is rendered which does not find the intent, this Court cannot presume its existence. In any case, the trial judge may decline to receive a special verdict, and insist that the jury return a general verdict of guilty or not guilty; but when a special verdict is found by the jury, neither the trial court nor the appellate court can add any fact not directly found, nor can its existence be presumed. The special verdict, however, finds that the beer shipped to the unknown member in the care of the defendant was, after delivery at defendant's club-house, "at once taken charge of by the manager and put in the refrigerators and mingled with the beer of other members, and on the same day and for some days thereafter said club manager delivered bottles of lager-beer to said member out of the club's refrigerators," until the member had exhausted the number of bottles ordered by him; and the learned counsel for the State earnestly contend that this commingling or voluntary confusion by the defendant of the several bottles of beer ordered by any two or more of its members transmuted the title of all of it to the defendant, and constitutes a subsequent delivery of it to any such member a *sale* by the defendant, and, therefore, a violation of the statute. It will be noted that the special verdict finds other facts pertinent to this contention, to wit, that the member who ordered the 10 dozen pint bottles of a particular brand of beer received that number of the brand when and as he desired; that beer coupons were issued to him showing the quantity and brand ordered; that when the quantity ordered by him and delivered to defendant was exhausted, he could get no more; and that the beer coupons were used as a check to prevent the member from overdrinking his beer. There was no agreement or understanding that the member was to be paid for any shortage, or that the defendant had any power of substitution or any right of disposal except as called for by the member who delivered it to the club. There was no storage charge or charge of any kind made or received by defendant for its service, nor any gain or profit of any kind or nature to it in the transaction, nor, if a sale, any consideration, however small, to support the transaction as a sale. It was wholly a gratuitous service. No consideration was paid the defendant, none promised it; the member drank the quantity and quality of beer as ordered by him, and no more. The defendant received nothing. A simple illustration will serve to present this contention. A, B, C, and D, each owning a Berkshire pig 4 months old, severally take them to their common friend, Farmer Jones, for his care and oversight. Farmer Jones, without charge and solely for the accommodation of his friends, accepts the pigs, and, having but one pen, he puts each pig into that pen as he is brought. His friends know this will be done. When A calls for his pig, suppose Farmer Jones should say to him: "A sale has been made to me by you of the pig." And if he were to deliver the pig to A, upon his persistent denial of a sale, he would say: "I now sell him to you again." We may well imagine the astonishment of both A and Farmer Jones; the former that a bailment solely for his benefit had been by act of the law, and contrary to the intention of the parties, without price received or even promised, converted into a sale; and the latter, Farmer Jones, that he had become the owner of property he did not intend to own, by the mere accommodating service rendered to his friends; and if a statute prohibited the sale of pigs by any person without a license therefor, that he had violated the criminal laws of the State. In our opinion, the transaction between the defendant club and its members was like unto this. *Union Stock Yards v. Western Land Co.,* 59 Fed., 49. It was a gratuitous bailment, solely for benefit of the member of defendant club—a *depositum* (Story on Bailment, sec. 41)—and no title was transferred to the bailee as against the bailor, for it is a generally accepted doctrine, "stated broadly and without any qualification, that a bailee may not, in any case, dispute or deny the title of the bailor." 5 Cyc., 172. The same doctrine has been declared by this Court. *Maxwell v. Houston,* 67 N. C., 305.

The special property or possessory interest of the bailee is thus stated in 5 Cyc., 171: "The bailee has, by virtue of the bailment and until its termination, a special property or possessory interest in the subject-matter which entitles him, whatever be the class of the bailment, to avail himself of any legal means *to defend it against any person who may interfere with his accomplishing the purposes of the bailment.*" *Hopper v. Miller,* 76 N. C., 402.

The effect of the commingling or confusion of property is illustrated by the decisions of the courts in the grain elevator or warehouse cases and is considered in the authorities. These cases establish the doctrine that, being a bailment when the grain is received, the transaction is not converted into a sale unless by special provisions of the contract. 1 Mechem on Sales, secs. 24, 25, 26. In *Woodward v. Seemans* (1890), 125 Ind., 330, the Court said: "It is the law of this jurisdiction, as well as of many others, that where a warehouseman receives grain on deposit for the owner, to be commingled with other grain in a common receptacle from which sales are made, the warehouseman keeping constantly on hand grain of like kind and quality for the depositor, and ready for delivery to him on call, the contract is one of bailment and not of sale." In *Rice v. Nixon,* 97 Ind., 97, the Court said: "There are cases in which a bailee is responsible for the loss of goods where he commingles *them with his own,* but this principle does not apply where a warehouseman receives grain to be stored for the owner. Articles of such a character can be separated by measurement, and no injury result to the owner from the act of the warehouseman in mingling them with like articles of his own. . . . There is, however, as shown by the cases cited, some conflict of opinion, but, as said in a late work, the great weight of authority is that the contract is one of bailment and not of sale, the warehouseman and the depositor becoming owners as tenants in common. Law of Prod. Ex., sec. 154, Auth. N. Q." And the Court further said: "If the warehouseman is not bound to place grain in a separate place for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors does not make him a purchaser; and if he is not a purchaser, then he is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale." Story on Bailment, sec. 40; Van Zile Bailments and Carriers, secs. 3, 5, 6, 7, and 8; *Coggs v. Bernard,* 2 Lord Raym., 912; *Bretz v. Diehl,* 117 Pa. St., 589; 2 Am. St., 706, and note by the editor, Judge Freeman; *Nelson v. Brown,* 44 Iowa, 455; *Irons v. Kentner,* 51 Iowa, 88, 33 Am. Rep., 119. In *Sturm v. Boker,* 150 U. S., 312, the Court said: "*The agency to sell and return the proceeds,* or the specific goods if not sold, stands precisely upon the same footing, and does not involve a change of title. An essential incident to trust property is that the trustee or bailee can never make use of it for his own benefit, nor can it be subjected by his creditors to the payment of his debts."

Applying, therefore, these settled doctrines of the law to the facts found in the special verdict, we are of the opinion that his Honor should have adjudged the defendant not guilty. The special verdict expressly finds that the defendant did not solicit or procure orders for beer—the only prohibited liquor order—nor was it the agent of the vendors (who lived beyond the State), and it is, therefore, not guilty under either section 2080 or 3534. *S. v. Johnston,* 139 N. C., 640; *S. v. Whisenant, supra; S. v. Burchfield,* 149 N. C., 537. The judgment is, therefore,

Reversed.

CLARK, C. J., dissenting: When the 180 members of this club made each his deposit for the purchase of liquor it went into the general fund of the club, and the money became the property of the club. In just the same way, when the depositors make general deposits in a bank, the money becomes the property of the bank, and the depositors become merely creditors of the bank to the amount of their deposits, for which they may draw. So when the defendant club received the liquors, purchased with the money of the depositors, and placed it, not on special deposit, but mingled together, such liquor became the property of the club. It is true, the lager-beer was not mingled with the champagne and the wine was not mixed with the whiskey, but all the liquors of each kind were mingled together. That is, each was received on general deposit, not on special deposit. When an order for beer was filled, it is agreed that it was not filled by delivering to a member the identical beer which he had ordered, but it was filled out of the general stock of that particular brand or drink.

It is found as a fact that "When an order is given by a member of the club, the money for the order is given to the manager of the club, and the manager turns the money over to the treasurer of the club. The treasurer of the club has a banking account, in which he banks the money received by him and sends the order on the liquor house, with the check of the club for the amount received from the member." It is true, it is further found that "The liquor is sent to the member in care of the club." But the true nature of the transaction is found by the next paragraph: "At the time the beer was received by the club (if the order was for beer), the manager would give the member a book, with the same number on it as was on the order blank and on the stub, and if the order was for 12 dozen bottles, the book would contain 12 dozen separate coupons. The manager of the club kept and keeps a system of refrigerators, in which *all the beers are mixed with the beer of other members of the club.* If the club member wants a bottle of beer for himself and a friend, he hands the book to the steward of the club, who would tear out as many coupons as bottles of beer ordered, and deliver to such member the number of such bottles of beer ordered, getting them out of the refrigerators where it was mixed with the other beer of the other members of the club."

Looking through all disguises, as the law must do in all cases, the true nature of this transaction is simply this: the members of this club pay in (besides the $10 initiation fee and $24 yearly dues) whatever sum each thinks proper to furnish funds with which to buy beer. Such fund becomes the property of the club, just as in case of general deposits in the bank. The club then sends its check for the amount of beer each member orders. It is true, the beer is sent in the name of each member, but to the care of the club. It is received by the club, and not segregated and placed on special deposit for each member, but it is all mingled together. The beer thereupon becomes the property of the club, just as general deposits in the bank. Thereupon, each member can check on the club from time to time and receive, not his own particular beer, but the quantity of beer he desires, for which he pays with his coupons, just exactly as a depositor checks money out of a bank. The bank owes the depositor so much money, and when it pays his check it does so with its own money. So, here, each member of the club has a general deposit entitling him to so many dollars' worth of beer. He has paid for it beforehand with the money he has deposited, and when he orders beer he cashes in his "coupons" exactly as a gambler cashes in his "chips." It cannot be said that he does not pay the club for the beer because he pays for it with a coupon. The coupons represent the cash he has on deposit, and when he pays for the beer with a coupon the coupon delivered up for that amount diminishes the cash credit which he has. The beer which he receives belongs to the club. It is true that a certain quantity of beer was shipped in his name, but it was shipped in the care of the club, received by it, and mixed with its other goods, and became the club's property, subject to draft. The use of the member's name as consignee was merely colorable, not changing the nature of the transaction, and at most it was like a check payable to a depositor, which he indorses and deposits in a bank. The bank places the proceeds to the credit of the depositor, but it becomes the property of the bank, which simply owes the depositor a debt payable in money, as here the club owes the member so many dollars' worth of beer, evidenced by coupons with which he can buy so much beer from time to time or, if he chooses, get the difference in money.

This is not the case of four farmers depositing four pigs. That is a special deposit, or bailment, and each man gets back his identical pig. Here, the member gets so many dollars' worth of coupons which he pays for beer from time to time, as he calls for it. He does not get his identical beer. He has none there. He gets the beer of the club. If the beer is stolen, it must be charged in a bill of indictment as the property of the club, just as when money is stolen from a bank it must be charged as the property of the bank, and not of the depositors. If an execution were issued against the club, it could be levied upon the beer, as its property. It would make no difference that there were outstanding coupons of the club which it had promised to receive when tendered in payment for beer.

Looking at the transaction as it really is, this is simply a *Coöperative Bar-room.* Instead of the barkeeper getting his pay out of the profits of his sales, he is paid a salary by the club. Instead of the members going up to the bar and laying down their cash and receiving liquor in exchange, they simply raise the sum necessary to keep up a stock of liquors, each man paying in advance what amount he thinks proper, the liquor being shipped in his name, but received by the club and mingled with the common stock. Instead of each customer paying cash at the time, he has simply paid in advance, receiving therefor coupons which "he cashes in" for liquor. It is not necessary that to make a sale there shall be any profit. Many sales are made at a loss. The sale is made when the club delivers the quantity of liquor ordered and receives in exchange its coupons which represent that amount of the indebtedness it owes to the member by reason of his cash deposit. The coupons represent an indebtedness of the club, and therefore are of value. This strongly resembles the laundry "system," in which one buys a book of coupons and pays for his washing (instead of his drinks) by tearing coupons out of the book.

There is every element of a sale. The defendant is therefore guilty on the second count for retailing spirituous liquors. It is also guilty on the third count, for it has "kept on hand for sale more than 2½ gallons of spirituous liquors contrary to law." It is even guilty on the first count, for its whole system, with its sumptuous quarters and its refrigerating system of keeping liquors on ice, is a standing bid or solicitation to those who have the requisite means and gentility to apply for liquors which cannot otherwise be obtained elsewhere, always cool and enticing, without risk. That the liquor belongs to the club is further shown by the fact that the icing, the refrigerating, the service, and the manager are all paid for out of the general funds of the club, that stores, ices, and dispenses the liquor.

The membership of this club is doubtless exclusive. They are gentlemen of means and position. They wish to obtain "a cold bottle and a hot bird" without the vulgarity of violating the law through the medium of a blind tiger. Besides, blind tigers are not furnished with refrigerators. It would give too much publicity. Among the members of this club are many gentlemen, doubtless, who are personal friends of each and every member of this Court. It seems a hardship to interfere with their pleasant arrangement to obtain cool drinks, on tap. There are many other features of the club than this, and to them no objections are raised; but their "coöperative bar-room Annex" is illegal. These gentlemen, however, are not on trial. What is on trial is the "system" which some ingenious and brilliant member of the bar (legal) has devised to "get by the judge." Somewhat similar "systems" were held invalid in *S. v. Neis,* 108 N. C., 787, and *S. v. Lockyear,* 95 N. C., 633. The author of this system has endeavored to avoid the features which were pointed out as most flagrant in those cases. But no device, however ingenious, can conceal the true nature of the transaction, which makes the manager of a social club a barkeeper on wages and which exchanges drinks or bottles against coupons which have been issued to members as evidence of a cash deposit.

Much has been said against prohibition as an unwarranted interference with the personal liberty of the citizen. And much has been said in favor of the duty of the State to repress the sale of liquor as a fruitful cause of drunkenness and crime. If so, it is none the less dangerous that the appetite for liquor is acquired, or maintained, in sumptuous club-houses and among respectable and wealthy men, who obtain their liquor duly cooled and handsomely served. Indeed, many young men will acquire the habit there who would not enter the purlieus of a corner groggery. Whatever the arguments for or against prohibition, the Court has no concern with them. The prohibition law was passed by the Legislature, representing the people. Having some doubt, possibly, as to their having truly expressed the will of their constituents, they sent the matter to the ballot box, by a *Referendum,* which, perhaps, should always be done in case of doubt, if the matter is of sufficient importance. On such referendum the people of this State settled the matter by a vote of 44,000 majority. The public policy thus declared should be enforced against all alike, without discrimination or exemption. If the "system" here invoked is valid, any number of men can chip in and buy a stock of liquors, issue coupons receivable as cash, in payment of drinks, and appoint one of their number "dealer," and settle up every now and then by comparing cash paid in and liquor consumed by each. The case is stronger against this defendant, for it is incorporated—a distinct entity.

The French have a maxim, *"noblesse oblige,"* which means that those in comfortable circumstances and possessed of means should set the example of obedience to the laws.

Devices to evade the law have been numerous and many of them ingenious. In *S. v. Winner,* 153 N. C., 602, at this term, from Wilmington, the defendant bought some small article at a store, and as he went out an unseen hand from behind a curtain handed him a drink. The jury and judge below properly held that this "scheme" would not avail. The counsel for this eminently respectable club, whose members merely seek to get their iced drinks without being termed lawbreakers, style this plan a "system." With the advent of prohibition numerous "systems" for the benefit of social clubs have been from time to time presented to the courts in different States. In one of the most recent of these, *Manning v. Canon City,* from Colorado, 23 L. R. A. (N. S.), 192, it was held: "The distribution of liquors kept by an unincorporated club to members who pay therefor sums which are used to replenish the supply of liquor, or to defray the expenses of the club, is a sale within the meaning of the prohibition law." In that case the Court, holding invalid a "system" very similar to that used here, called attention to the fact that when Prohibition was new the decisions of the courts, rendered by judges brought up under the old system, went very far towards exempting clubs of social respectability, the courts being often astute to find reasons therefor; but that now there has been a steady trend of the courts in the other direction, and the disposition is to enforce the law without discrimination or excuse. Hence many of the older cases are not authority. The cases cited by the Court, and the annotations to that case, sustain this observation. To the same purport is *Maine v. Kapickso,* 23 L. R. A. (N. S.), 737. In *S. v. Minn. Club,* 20 L. R. A. (N. S.), 1102, the Supreme Court of Minnesota held: "The distribution of intoxicating liquors in less quantities than 5 gallons by a social club to its members, for a consideration, though without profit, constitutes a 'sale,' and is prohibited." In this State we need only refer to *S. v. Neis,* 108 N. C., 787, and *S. v. Lockyear,* 95 N. C., 635, for instances holding invalid other "systems" offered by social clubs.

A law ought to be construed in its spirit. No one can doubt that if, when the prohibition law was framed, it had been proposed to exempt social clubs, who could hire their barkeeper on wages, and pay cash in advance for their liquor, to be retailed to their members and friends, as is the case here, the proposition would have been voted down. A leading prohibitionist, who was found imbibing at a social club, was asked if he did not favor prohibition. He replied that he did—"for poor white folks and niggers." This is exactly what our Prohibition law amounts to, if it permits such acts as the defendant has been convicted of.

It must be remembered that the last General Assembly, Laws 1909, ch. 438, sec. 64, provided: "No social club for the dispensing of liquors shall hereafter be permitted or chartered." The presentment by the grand jury charged that the defendant had a United States liquor license; but that feature is not referred to in the "facts agreed."

The well-known expression, "equal rights to all and special privileges to none," is not a figure of rhetoric, but the truest expression of the American sentiment. If the law exempt liquor selling by social clubs, however respectable, by devices, however ingenious, it should permit it as to all others and without device. If a hole has been dug under the fence, the hole should be stopped or the fence torn down.

HOKE, J., dissenting: On the facts established by the special verdict in this case, I am of the opinion that the title to this beer was in the defendant, the Colonial Club, and that the transaction by which a portion of it was from time to time passed over to the members constituted a sale, and in violation of our statute-law on the subject. If the matter could be properly regarded as a separated series of transactions, considering each one just at the point when it would favor defendant's position, some support might be found for the ruling by which defendant is to be exonerated; but, to my mind, the arrangement should be considered and dealt with as a whole, and in that view, as I interpret the verdict, it appears that the member desiring beer gave a statement of the kind and quantity to defendant's treasurer and manager, and paid him the amount of money required. This money was covered into the club treasury and became, in form at least, a part of its general funds. The treasurer then gave an order for beer to a nonresident dealer, sending the club's check for the price, and the beer was shipped to the defendant, and on arrival it was taken charge of by the treasurer and became a part of a general and larger quantity of beer in the care and control of the club, to be kept and cooled and handed over on demand of the members by the small. The order went from the club to the dealer, the money was taken from the general treasury and paid for by the check of the club's manager. The beer was shipped from the dealer to the club and became an unidentified part of a larger quantity of beer or other liquor procured on the same general plan. Such an arrangement clearly put the title to the beer in the club, and this result is not prevented by the fact that the name of the individual member was placed on the crate when it was shipped. It was sent to the club to be taken charge of by its treasurer and to become, as stated, a part of a general larger quantity of beer kept on hand for its members, and was so intended by all of the parties from the beginning. The title, therefore, passed from the dealer to the club, and when it was passed over to the individual member by the small on receipt of a coupon prepared for the purpose and representing value, this was a sale violative of law, and should be so considered and dealt with.

The *Grain Elevator cases* referred to and, to some extent, relied upon in the opinion of the Court bear very little resemblance to the facts presented here, and even they are regarded by authors of approved excellence, Mr. Benjamin and others, as rather an exception to the general law applicable to sales.

The contrivance or "system" resorted to in this instance can hardly be classed as ingenious—it is too bald. It does not require a costly dwelling-place or an attractive environment to constitute a club, and if this transaction can be upheld as lawful, there is good reason to apprehend that the legislation we have enacted in the effort to minimize the evils of the liquor traffic will have been in vain.

STATE v. TOM SIMONDS.

(Filed 20 December, 1910.)

1. **Witnesses—Questions—Incriminative—Waiver.**

   By voluntarily answering a question on cross-examination after objection thereto by his attorney, a defendant waives his constitutional privilege not to answer questions tending to incriminate himself, both as to other and distinct crimes and those used to prove the offense with which he stands charged.

2. **Murder—Manslaughter—Act of Necessity—Self-defense—Instructions—Presumptions.**

   Upon trial on an indictment for murder the judge charged the jury that unless the defendant "has further satisfied you that he killed him (deceased) from necessity or from a principle of self-defense, your verdict must be guilty of manslaughter": *Held*, not reversible error, defendant having failed to send up the charge of the court, and the presumption being that he correctly charged upon the law of self-defense.

3. **Murder—Manslaughter—Self-defense—Deadly Weapon—Willing Acts—Burden of Proof.**

   It being admitted that defendant killed deceased with a pistol, it is for him to prove that it was done in self-defense, if that plea is relied on; and an objection that there was not sufficient evidence that he acted willingly is not tenable, the law presuming that he did.

APPEAL from *Joseph S. Adams, J.*, at November Term, 1910, of BUNCOMBE.

The defendant was indicted for the murder of Albert Murphy. Before the jury was impaneled the solicitor for the State stated that he would not ask for murder in the first degree, but only for a verdict of murder in the second degree or manslaughter. The jury rendered a verdict of manslaughter. From the judgment of the court the defendant appealed.

Attorney-General and G. L. Jones for the State.
Frank Carter and Craig, Martin & Thomason for defendant.

BROWN, J. The evidence tends to prove that the deceased was killed by defendant at the residence of one Mollie Brooks about midnight on 10 June, 1909, in the city of Asheville; that illicit relations existed between the woman and the defendant; that the deceased came to the house, while the woman was out, and inquired of defendant her whereabouts. The deceased and defendant had some words, and a pistol duel ensued, in which defendant fired four times and killed deceased. The defendant admitted the killing and set up the plea of self-defense.

The defendant, represented by counsel, was introduced as a witness in his own behalf, and upon cross-examination was asked if he had not held sexual intercourse with Mollie Brooks. His counsel interposed an objection, which was overruled. Thereupon the defendant testified that he had had sexual intercourse with the woman.

It is settled law in this State that when a person charged with crime voluntarily testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him. *S. v. Allen*, 107 N. C., 805. Under such circumstances, he can be asked questions as to other and distinct crimes as well as used to prove the very offense with which he stands charged. *S. v. Thomas*, 98 N. C., 599.

There are only three assignments of error noted in the defendant's brief. They are as follows:

Exception 3: "His Honor charged the jury as follows: If, however, the defendant has satisfied you that the killing was without malice, then, unless he has further satisfied you that he killed him from necessity or from a principle of self-defense, your verdict must be guilty of manslaughter. We respectfully submit that this is not the law."

Exception 5: "His Honor charged the jury as follows: If you find that the defendant was ready and willing to enter into a combat with the deceased, and that a mutual combat occurred, both the defendant and the deceased entering into it willingly, then the defendant cannot be excused for taking the life of the deceased to save his own, no matter to what extremity he may have been reduced, unless he definitely withdrew from the combat before he fired the fatal shot, for in that case it may rightfully and truthfully be said that he brought the necessity upon himself by his own criminal conduct."

Exception 6: "His Honor also charged the jury as follows: If you find from the evidence that the deceased and the defendant met and a sudden quarrel arose and a fight ensued, in which both parties willingly engaged and in which both parties used deadly weapons, and in which deceased was killed, then the defendant would be guilty of manslaughter."

The error which the defendant alleges in both these exceptions is that there is no evidence that the defendant "fought willingly."

As to exception 3: If his Honor had charged the jury that the defendant must satisfy the jury that he killed from necessity, and stopped there, he would have been in error. *S. v. Castle,* 133 N. C., 769. But his Honor added, "or from a principle of self-defense."

His Honor's charge is not in the record, and it was appellant's duty to send it up. The record contains only the defendant's assignments of error and a *verbatim* copy of the stenographer's notes. But we are bound to assume the experienced lawyer and judge, who presided, correctly explained to the jury what are the "principles of self-defense" expounded in so many decisions of this Court, and had he not done so, exception would have been taken and the charge sent up.

The ground of attack embodied in exceptions 5 and 6, as stated in the brief, is that there is no evidence that the defendant fought willingly. The actual killing of the deceased with a pistol having been admitted by defendant, the State was not bound to prove that defendant fought willingly. The law presumes that he did, and the *onus* is upon him to offer evidence sufficient to satisfy the jury that he fought in self-defense, or, failing in that, to offer evidence sufficient to reduce the crime to manslaughter.

This rule has been uniformly adhered to by this Court in indictments for homicide. It is said in *S. v. Worley,* 141 N. C., 767: "No principle in our criminal law is better settled than that a killing with a deadly weapon implies malice, and, when admitted or proved, the prisoner is guilty of murder in the second degree, and the burden rests upon him to prove the facts upon which he relies for mitigation or excuse, to the satisfaction of the jury."

In that case and *S. v. Quick,* 150 N. C., 821, the authorities are cited.

No error.

STATE v. JESSE MALONEE.

(Filed 20 December, 1910.)

1. **Marriage—Seduction—Breach of Promise—Testimony of Prosecutrix—Supporting Evidence—Interpretation of Statutes.**

   The testimony of the prosecutrix, on the trial of an indictment for seduction under a promise of marriage, as to the promise, seduction, and her innocence and virtue, supported by the fact that a child was afterwards born to her, and other evidence tending to show that prior to her alleged seduction she had always been of good character, had led a blameless life, and as a schoolgirl had borne a good reputation with her teacher and schoolmates, together with the admission of the defendant that he promised to marry her before the seduction, is supporting evidence under the statute providing that the unsupported testimony of the woman shall not be sufficient to convict. Revisal, sec. 3354.

2. **Marriage—Seduction—Breach of Promise—Evidence—Time.**

   In an action for breach of promise of marriage the proof of chastity of the woman should relate to the time preceding the seduction or the date when it became known.

3. **Marriage—Seduction—Breach of Promise—Engagement—Admission—Supporting Evidence.**

The admission by the defendant to the brother of the prosecutrix of his engagement to be married to her is supporting evidence of the promise of marriage, and sufficient if it fully satisfies the jury of the fact.

4. **Marriage—Seduction—Breach of Promise—Evidence—Causal Connection—Questions for Jury.**

In the trial of an indictment for seduction under the statute, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse; and in this case it may be inferred by the jury under evidence tending to show the reputation, innocence and virtue of the woman, the seduction under the promise, the prior intimacy and relation of the parties, the birth of the child and its resemblance to the defendant and his flight after indictment.

5. **Marriage—Seduction—Breach of Promise—Instructions — Harmless Error.**

In the trial of this indictment, the remarks of the court, in the charge, upon the resemblance of the child, as tending to show its paternity, may not have been consistent with perfect accuracy of expression, yet, taken in connection with what preceded and followed, did not constitute reversible error, as they were proper in order to guide the jury in correctly applying the proof.

6. **Marriage—Seduction—Breach of Promise—Instructions—Weight of Evidence—Questions for Jury.**

The remarks of the judge to the jury upon the flight of the defendant from the State after indictment did not constitute reversible error when considered in connection with all the evidence, as the jury should pass upon the whole evidence and decide what weight should be given the fact of flight, and to what extent the explanatory evidence affected the probative force of the flight as a fact tending to show guilt.

7. **Instructions, Detached Portions—Record—Appeal and Error.**

The incorrectness of a charge may not be determined on appeal from one or two detached portions excepted to, and when the entire charge is not set forth in the record, it will be assumed that it correctly stated the law of the case to the jury, in the absence of any showing to the contrary.

APPEAL by defendant from *J. S. Adams, J.*, at Spring Term, 1910, of JACKSON.

The facts are sufficiently stated in the opinion of *Mr. Justice Walker.*

Attorney-General and George L. Jones for the State.
J. Frank Ray for defendant, appellant.

WALKER, J. The defendant was indicted for the crime of seducing an innocent and virtuous woman under promise of marriage. (Revisal, sec. 3354.) The statute provides that the unsupported testimony of the woman shall not be sufficient to convict. The prosecutrix testified to the promise of marriage, the seduction, and her innocence and virtue. A child was born to her, and was eighteen months old at the time of the trial. There was evidence tending to show that prior to her alleged seduction by the defendant she had always been a woman of good character and led a blameless life, and that as a schoolgirl she had borne a good reputation with her teacher and schoolmates. This was sufficient to constitute supporting testimony within the meaning and requirement of the statute. *S. v. Horton,* 100 N. C., 443; *S. v. Sharpe,* 132 Mo., 171; *S. v. Deitrick,* 51 Iowa, 469; *S. v. Bryan,* 34 Kan., 72; *Zabriskie v. State,* 43 N. J. Law, 644. The proof of chastity should relate to the time preceding the seduction or the date when it became known, as it is manifest that her reputation in that regard would be injuriously affected by the offense itself when revealed, and the very crime would thus become the means of protecting the criminal, and the more notorious the seduction and the more extensively her shame had been published to the world, the more certain would be the immunity from punishment. *People v. Brewer,* 27 Mich., 134. We do not see how the innocence and virtue of a woman could be shown by testimony additional to her own, unless her reputation is competent evidence for the jury to consider. It would be a negative and a fact most difficult if not impossible to establish. It is settled by the authorities that the supporting evidence need be such only as the nature of the fact required to be proved admits of being furnished. *Armstrong v. People,* 70 N. Y., 38.

There was supporting evidence as to the promise of marriage. The defendant admitted to the brother of the prosecutrix that he was engaged to be married to her. This was sufficient if it fully satisfied the jury of the fact. *S. v. Raynor,* 145 N. C., 472; *S. v. Horton, supra; S. v. Kincaid,* 142 N. C., 657; *S. v. Ring,* 142 N. C., 596.

We said in *S. v. Ring, supra,* that it is sufficient if the jury can fairly infer from the evidence that the seduction was accomplished by reason of the promise of marriage, giving to the defendant the benefit of any reasonable doubt, and that no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse. In *Armstrong v. People, supra,* it is held that the illicit act and the immediate persuasions and inducements which led to its commission may not be susceptible of proof by the evidence of third persons directly to the facts. They are to be inferred from the facts and circumstances of the case. So in this case we have as proof of the several elements of the crime—that is, the innocence and virtue of the woman and the seduction under the promise of marriage—the reputation of the prosecutrix, the intimate association and relation of the parties, the admission of the defendant that he had promised to marry the prosecutrix, the birth of the child and its resemblance to the defendant, if upon its exhibition to them the jury found there was such a likeness (*S. v. Horton, supra*), and the flight of the defendant to another State after the indictment had been returned against him. The resemblance of the child to the defendant tended only to prove the sexual intimacy and not the promise of marriage, but it was a circumstance which the jury had the right to consider with reference to the fact it tended to establish, and the court instructed them properly as to its bearing. The reference by the court to the resemblance as tending to show the paternity of the child, which is criticised by the defendant's counsel, may not have been consistent with perfect accuracy of expression, but it appears to have been intended, when read in connection with what preceded and followed, to guide the jury in correctly applying the proof. The same may be said as to the flight of the defendant. While it is true, as contended by the defendant's counsel, that it was a circumstance from which, in connection with other circumstances, the jury might draw an inference of conscious guilt unless explained (12 Cyc., 610), the whole matter is for them to pass upon, and they must decide what weight they will give to the fact of flight, and if there was explanatory evidence, to what extent it affects the probative force of the flight as a fact tending to show guilt. The entire charge is not set forth in the record, and we must assume, therefore, that it correctly stated the law of the case to the jury, in the absence of any showing to the contrary. We cannot condemn it by what was said in one or two detached portions, even if they are erroneous, because they may have been explained and corrected in other parts of the charge. *S. v. Kinsauls,* 126 N. C., 1097.

A careful examination of the evidence, the charge of the court, and incidents of the trial does not disclose any error of which the defendant can justly complain.

No error.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

SPRING TERM, 1911.

J. T. WILLIAMS & BRO. v. BRANNING MANUFACTURING COMPANY.

(Filed 22 February, 1911.)

Arbitration and Award—Courts—Jurisdiction—Ouster—Effect—Estoppel.

When the effect of an agreement to arbitrate controversies which may arise in the course of executing a contract is to oust the jurisdiction of the courts in such matters, it cannot be enforced against one of the parties as a condition precedent to his bringing his action; though as to other matters embraced therein which have arisen and have been referred to arbitration, and as to which an award has been rendered, the effect of the award is to conclude the parties. In this case amendment to pleadings is suggested so as to conform the issues to matters left in dispute.

APPEAL by plaintiff from *Ward, J.*, at Spring Term, 1910, of HERTFORD.

The facts are sufficiently stated in the opinion of *Mr. Justice Walker.*

Winborne & Winborne and John E. Vann for plaintiff.

Pruden & Pruden, W. M. Bond, and S. Brown Shepherd for defendant.

WALKER, J. This case was before the Court at the last term, and is reported in 153 N. C., at page 7. We then held that the award of the arbitrators barred the plaintiff's recovery in this action as to all dealings and transactions which occurred prior to 20 February, 1906, that being the date of the submission to arbitration, and we reversed the judgment of the court below only to that extent. This decision was in perfect accord with the agreement of the parties, which, in express terms, restricted the arbitration to transactions which had occurred prior to that date, and in the answer of the defendant the arbitration and award are pleaded only in bar of a recovery for the damages which accrued before that date. In the Superior Court judgment was entered upon the certificate of this Court, not according to the opinion, which, we think, clearly defined the extent of the reversal of the former judgment, but to the effect that the agreement to arbitrate, pleaded by the defendant, is a bar to the plaintiff's entire cause of action, and it was directed that the defendant go without day and recover its costs. This judgment was beyond the scope of our decision. We did not consider the legal effect of the agreement to arbitrate, but held that, so far as the parties had actually arbitrated their differences, and with respect to the matters embraced by the award, which was rendered before notice by the plaintiff of his election to revoke the arbitration, the award was a bar. The judgment of the court, therefore, was erroneous, unless it can be sustained upon the ground that the agreement to arbitrate all disputes between the parties, which should arise in the execution of the contract, is a bar to the further prosecution of this action to recover damages based upon transactions since 20 February, 1906, which the defendant now insists deprives the plaintiff of the right to sue upon the contract, and confines him to the remedy by arbitration. Section 9 of the contract containing this agreement is fully set out in 153 N. C., at page 7.

It has generally been held that an agreement to arbitrate controversies which may arise in the course of executing a contract is void, as its effect is to oust the jurisdiction of the courts. It was held in *Kinney v. B. and O. E. Assn.* (W. Va.), 15 L. R. A., 142, and note, that a provision in a contract that all differences arising under it shall be submitted to arbitrators, thereafter to be chosen, will not prevent a party from maintaining a suit, in the first instance, in a court to enforce his rights under it. The Court, in *Ins. Co. v. Morse,* 87 U. S. (20 Wall.), 445, relying upon the authority of Judge Story (Equity Jurisprudence, sec. 670), and *Stephenson v. Ins. Co.,* 54 Me., 70, thus stated the rule: "Where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced. 'While parties may impose as a condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdiction; as conditions precedent to an appeal to the courts, they are void.' Many cases can be cited in support of the rule thus laid down. Upon its own merits, this agreement cannot be sustained." The language of other courts is equally explicit: "Where a policy provides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitration, the condition is void. The effect of such a provision is to oust the courts of their legitimate jurisdiction, which the parties cannot do." *Ins. Co. v. Etherton,* 25 Neb., 505. "There is no authority for holding that parties who have agreed to arbitrate have, by their agreement, precluded themselves from resorting to a court of justice. Such agreements will not be specifically enforced, nor will the arbitrators be compelled to act. And it is well settled that they cannot be pleaded in bar." *McGunn v. Hamlin,* 29 Mich., 476. "The agreement to submit to arbitrators, not consummated by an award, is universally held to be no bar to a suit at law or equity; nor can it be the foundation of a decree for specific execution. In its very nature it must rest on the good faith and consent of the parties concerned. Parties litigant cannot by such arrangements oust the jurisdiction of the courts or deprive themselves of the right to resort to the legal tribunals for the settlement of their controversies. After the arbitrators have acted and rendered an award, the case is very different. Their decision is binding upon the parties, and can be successfully impeached only upon the grounds which would invalidate any other judgment. This distinction between a mere agreement to submit and a submission consummated by an award is universally recognized by the authorities. Morse on Arbitration, 79, 90. One of the leading cases on the subject is that of *Tobey v. Bristol,* 3 Story, 822, where the whole subject is exhaustively considered and many decisions cited by *Mr. Justice Story.* The only remedy for the party aggrieved is by an action for damages growing out of the breach of the submission." See, also, *Hill v. More,* 40 Me., 515; *Leach v. Ins. Co.,* 58 N. H., 245; *Nurney v. Ins. Co.,* 63 Mich., 633; *Haggart v. Morgan,* 5 N. Y., 422 (55 Am. Dec., 350, and note); *The Excelsior,* 123 U. S., 40; *Smith v. Alker,* 102 N. Y., 87. Numerous other cases are to the same effect, some of which are collected in the notes to 15 L. R. A., 142, and 55 Am. Dec., 350, cited above.

This Court, by *Justice Manning,* in *Kelly v. Trimont Lodge,* at last term, *ante,* 97, adopted the principle as stated in *Stephenson v. Ins. Co., supra,* in the following words: "The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case than they have to provide a remedy prohibited by law." The learned justice then proceeds to state the result of the decisions in this Court upon the subject: "Our Court has uniformly held to the doctrine that when a cause of action has arisen the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been, also, generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy, and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer," citing *Braddy v. Ins. Co.,* 115 N. C., 354, and *Mfg. Co. v. Assur. Co.,* 106 N. C., 28. In *Braddy's case, supra, Justice Avery* said: "While it is well settled that an agreement in a policy of insurance to submit to arbitrators the single question of the amount of loss by fire sustained by the person insured is not invalid (*Mfg. Co. v. Assur. Co.,* 106 N. C., 28; *Carroll v. Ins. Co.,* 72 Cal., 297), it is equally well understood that a contract which would oust the jurisdiction of the courts by leaving all of the matters involved in any controversy that might arise between insurer and insured to such arbitrament is void, as against public policy. Angell on Insurance, 431; *Scott v. Avery,* 20 E. L. and E., 327; *s. c.,* 8 Exch., 487; *Sancilito v. C. U. A. Co.,* 66 Cal., 256; 2 Biddell Ins., sec. 1154." *Kelly v. Trimont Lodge, supra,* was a case for the recovery of money due for sick benefits. We held that the stipulation in the contract for arbitration of differences should be restricted to those of a legislative or administrative character, and was, therefore, valid; but that, as the question involved in the case related to the plaintiff's property rights, it could have no application, and the plaintiff could resort to the courts for the enforcement of those rights, notwithstanding the arbitration clause in the contract.

The principle which we have stated as having received the sanction of the courts of England and this country is recognized as sound and well settled in other decisions of this Court. *Carpenter v. Tucker,* 98 N. C., 316; *Tyson v. Robinson,* 25 N. C., 333; *Swaim v. Swaim,* 14 N. C., 24.

There is no stipulation in this contract that no suit shall be brought until the amount of loss or damage is ascertained by arbitration, as in *Mfg. Co. v. Assur. Co., supra,* but a sweeping provision that both the liability and the loss shall be decided and settled by arbitrators, and by clear implication it excludes the right of resort to the courts. *Ins. Co. v. Alvord,* 61 Fed. Rep., 752. Stipulations expressed in language not unlike that which the parties used in the arbitration clause of this contract have, as we have seen, been held to be void and not available as a bar to an action on the contract.

It may be observed that the defendant has not attempted to arbitrate the differences which have arisen. In *Smith v. Alker, supra,* it was said that this fact deprives him of the right to rely upon the agreement for arbitration. "No evidence," says the Court, "was given that the defendant took any steps for the selection of arbitrators. It was not more the duty of the plaintiff than that of the defendant to do so. We need not inquire, therefore, how far, if at all, such defense would have availed," if such steps had been taken. His plea, based upon the clause as to arbitration, was, accordingly, overruled.

Our conclusion is that the judgment of the court below was not authorized by the opinion and certificate of this Court, which covered only the items of the plaintiff's bill of particulars, dated prior to 20 February, 1906. As to items of subsequent date, the judgment was erroneous. In that respect, it is not in accordance with our former decision and cannot be upheld as justified by the defendant's plea, based upon the arbitration clause of the contract, which we hold to be void.

We would suggest that the plaintiff be permitted to file an amended complaint, eliminating the items of his account already passed upon, and confining the pleadings and issues to the matters which are now in dispute. This will prevent confusion in the further consideration of the case. The judgment is set aside, and the court will proceed further in the cause, in accordance with this opinion.

Error.

J. KENYON WILSON v. MRS. M. TAYLOR.

(Filed 22 February, 1911.)

1. **Bankruptcy—Trustee—Bond—Evidence.**
   A certified copy of the bond of a trustee in bankruptcy and the order of the referee approving it is sufficient evidence of the official character of the trustee named therein and of his right to sue for and recover the property of the bankrupt.

2. **Issues, Form of.**
   It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on its merits.

3. **Same.**
   In this action brought by the trustee in bankruptcy to recover of a creditor the amount of an alleged preference under the Bankrupt Act, it was *Held*, that an issue, "Is the defendant indebted to the plaintiff, and, if so, in what sum?" was preferable to separate issues as to the various elements necessary under the Bankrupt Act to constitute a preference; and it appearing that the case was correctly tried under the issue submitted, the alleged preferred creditor will not be heard to complain that he had not introduced pertinent evidence because the various issues tendered by him had been refused by the court.

4. **Bankruptcy—Preferences.**
   A preference by an insolvent debtor is given under the Bankrupt Act if, within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication, he procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

5. **Same—Inquiry—Notice Implied.**
   When a person receiving or to be benefited by a preference prohibited by the Bankrupt Act, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it is voidable by the trustee, and he may recover the property or its value from such person.

6. Bankruptcy—Preferences—Fraud in Law—Constructive Fraud.

In order to invalidate a preference received under the provisions of the Bankrupt Act, it is not necessary to show any moral or actual fraud, as it is only a matter of constructive fraud, arising by law upon the existence of certain transactions forbidden by the act, the purpose of which is to prevent creditors from obtaining a preference over others of the same class.

7. Bankruptcy—Preference.

It is not material whether a payment or transfer prohibited by the Bankrupt Act is made directly or indirectly to the creditor whose claim is preferentially satisfied thereby, for it is sufficient if he receives the benefit of the preference.

8. Same—Inquiry—Constructive Notice.

Actual knowledge or belief of the intent to prefer is not required by the Bankrupt Act, and a reasonable cause to believe that such was the intent is sufficient. A party affected by notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired if he had made the necessary effort to discover the truth.

9. Same—Rule of the Prudent Man.

Under the provisions of the Bankrupt Act a creditor has reasonable cause to believe his debtor intends to prefer him when such a state of facts is brought to his attention as would lead a prudent man, when put upon his guard, to the conclusion that such is his intent.

10. Same—Evidence—Notice.

In this case there was evidence tending to show that a creditor, to whom her debt had been paid under a clause of preference in a deed of assignment, and which was sought to be recovered by the debtor's trustee in bankruptcy, told the trustee that she was protected by the deed of assignment and admitted to him that she had been informed of her preference as a creditor, and asked and received the money for her debt by virtue of the preference: *Held*, upon any view of the testimony, she had knowledge of facts and circumstances from which the law clearly implies notice.

APPEAL from *Ward, J.*, at September Term, 1910, of CAMDEN.

This action was brought by the plaintiff, as trustee in bankruptcy of J. W. Taylor, to recover of the defendant the sum of $901, alleged to have been paid to the defendant, as a preferred creditor, by C. H. Spencer, assignee, under a general assignment executed by Taylor for the benefit of his creditors. The defendant in her answer denied her liability to the plaintiff and tendered separate issues as to the bankruptcy, the appointment of the plaintiff as trustee, the assignment of his property by Taylor within four months before the filing of the petition in bankruptcy, the payment to her by Taylor, through his assignee, of $901 within the said time, the knowledge of defendant or reasonable cause to believe that it was intended thereby to give her a preference, and the amount plaintiff is entitled to recover. The court refused to submit these issues, but substituted for them the following issue: "Is the defendant indebted to the plaintiff? If so, in what sum?" Defendant excepted.

Plaintiff introduced in evidence duly certified copies of the following papers filed in the bankruptcy proceedings: Subpœna, order to show cause, order of reference, order of adjudication, notice to trustee of his appointment, bond of trustee and order of referee approving the bond of the trustee. Defendant objected to the introduction of these papers, not, however, upon the ground that they were not properly authenticated, but because they were not sufficient in law to prove the appointment of the plaintiff as trustee without a copy of that part of the record showing the appointment of the plaintiff as trustee by the creditors, with the approval of the referee in bankruptcy. The objection was overruled, and the defendant excepted.

The evidence tended to show that at the time J. W. Taylor made the assignment for the benefit of his creditors his indebtedness amounted to $12,000 and his assets to $1,855. The defendant was preferred in the assignment to the amount of her claim, which was $901, and it and the other preferred debts, amounting to $559.79, were paid to the creditors by the assignee, and the balance, $394.21, paid to the trustee in bankruptcy. It was admitted that, at the time J. W. Taylor executed the assignment, he was insolvent. C. H. Spencer, the assignee, testified that he paid the $901 to the defendant through J. W. Taylor, who delivered the checks to her. One of the checks was signed by him as assignee. The defendant asked the trustee to send her a check for the amount due her, and after seeing her he did so. While he could not say that she had seen the assignment or knew of it, she received the money from him as due to her under the assignment. He further testified as follows: "The amount of assets collected was $1,855, and I paid the $901 out of this. The indebtedness was by note. I did not tell her of the assignment and its provisions; she came to me and said she had been informed that she was a preferred creditor, and asked me to pay her over the money. She told me she was protected, and I said it was so. She took from me the money with that understanding. She knew little or nothing about business."

The court charged the jury that, "If they found all the facts to be as testified, their answer to the issue would be Yes, in the sum of $850, with interest from 28 August, 1909." Defendant excepted. The jury rendered a verdict for the amount stated in the instruction. Defendant's motion for a new trial having been overruled and judgment entered upon the verdict, she appealed to this Court.

W. M. Bond and C. E. Thompson for plaintiff.
E. F. Aydlett and J. C. B. Ehringhaus for defendant.

WALKER, J., after stating the case: The first exception of the defendant, that there was not sufficient evidence of the appointment and qualification of the plaintiff as trustee, cannot be sustained. Under the Bankrupt Act, the trustee qualifies by giving his bond and having the same approved by the referee. It is the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him of his appointment, and the trustee thereupon is required to give notice of his acceptance or rejection of the trust. If he accepts the trust, he must file an official bond, as prescribed by the act, and this must be approved by the court or referee. Bankruptcy Act, sec. 50b; General Orders in Bankruptcy, No. 16; Loveland on Bankruptcy, sec. 142, pp. 852 and 1149. The act further provides that "a certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee, if recorded, would have imparted had not bankruptcy proceedings intervened." 2 Remington on Bankruptcy, p. 1766. If the other records introduced in evidence were not sufficient to prove the official character of the plaintiff and to establish his right to sue for and recover the property of the bankrupt, the provision to which we have just referred fully answers this objection of the defendant, as the plaintiff introduced a certified copy of the bond and the order of approval.

The issue submitted by the court to the jury enabled the defendant to present fully her side of the case and required the jury to answer affirmatively every question embraced in the issues tendered by the defendant before they could render a verdict against her. If one issue will fulfill the purpose of affording to each party a fair opportunity of developing his case, it is much better to submit the case to the jury in that way than to multiply issues which may tend to confusion. Why require the jury to answer many issues, when the answer to one will do, if that one presents fully all matters in controversy? We do not think the defendant was prejudiced in the least by the ruling of the court as to the issues. If the defendant did not go upon the stand and testify herself and offer other witnesses in her own behalf, and thus avail herself of the fair opportunity she had of making good her defense, it was her own fault, and she cannot be heard now to say that she did not do so because the issues tendered by her were not accepted. *Deaver v. Deaver,* 137 N. C., 246; *In re Herring's Will,* 152 N. C., 258. We repeat what was said in *Deaver's case, supra:* "It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on the merits."

The last exception presents the real question in the case. Was the evidence offered sufficient to show a preference voidable under the bankrupt law? To which we must give an affirmative answer. A person is deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Bankrupt Act, sec. 60a; Brandenburg on Bankruptcy (3 Ed.), secs. 946 and 947. In the case of a transfer, the four months do not expire until that period has elapsed after the registration of the instrument, if required to be recorded. In the case of a preference, if the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. Bankrupt Act, sec. 60b; Brandenburg, sec. 961. It appears in this case, without any serious controversy as to the facts, that while J. W. Taylor was insolvent he made a transfer, or assignment, which is the same thing, of all his property for the benefit of his creditors, with a preference in favor of the defendant to the full amount of his indebtedness to her, and after paying the preferred debts, the residue was not sufficient to pay the other creditors. The result, therefore, was that the defendant was given a greater percentage of her claim than some of the other creditors in the same class with her, and this transfer was made and registered within four months before the filing of the petition and the adjudication of bankruptcy. It follows from these undisputed facts that if the defendant had reasonable cause to believe that result was intended, the preferential payment she received was void under the bankrupt law, and she is liable to the plaintiff, as trustee in bankruptcy, for the amount thereof. It is not necessary, in order to invalidate the preference, that there should have been any moral or actual fraud. It is simply a constructive fraud, arising by law upon the existence of certain facts and forbidden by it. There is nothing dishonest or illegal in a creditor's obtaining payment of a debt due him from a failing or embarrassed debtor, nor in his attempting, by proper and ordinary effort, to secure an honest debt; but such an act may afterwards become constructively fraudulent and illegal, by reason of the filing of a petition and an adjudication in bankruptcy. It is voidable by the trustee of the bankrupt's estate because the law says it shall be so, regardless of the moral quality of the act or intent, or the motive of the debtor, however honest it may have been. The law considers only the ultimate effect of such act as being inconsistent with the very purpose and policy of the Bankrupt Act, which is the equal and equitable distribution of the bankrupt's estate among his creditors, subject only to the preferences or priorities therein allowed. Brandenburg, secs. 962, 966. "The acts mentioned in this section are not such as were forbidden by the common law, or generally by the statutes of the States; nor are they acts which in their nature are immoral or dishonest. In order to carry out the spirit of the bankrupt system—an equal division of the bankrupt's property among his creditors—Congress has adopted a conventional rule to determine the validity of these preferences. It has prescribed a limit of four months. Any (forbidden) transfer made within that time is fraudulent and voidable. It is not so because such preferences are morally wrong, but because the act says they are." *Bean v. Brookmire,* Fed. Cases, No. 1168; *In re Cobb,* 96 Fed. Rep., 821. Nor is it material whether the payment or transfer is made directly or indirectly to the creditor, whose claim is preferentially satisfied thereby. If he receives the benefit of the preference, as the defendant did in this case, it is sufficient. *Goldman v. Smith,* 93 Fed. Rep., 182; Brandenburg, sec. 69. The form of the transfer or payment is not considered, but the substance of the transaction and its effect in preventing an equal division of the debtor's property among his creditors, subject to preferences lawfully acquired under the law and recognized in the act as valid. The payment, therefore, to the defendant by the assignee was, in legal effect, a payment to her by the bankrupt, as much so as if he had made the payment himself to her.

Actual knowledge of the intent to prefer is not required, nor even a belief, but simply reasonable cause to believe that such was the intent. A party who may be affected by notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired if he had made the necessary effort to discover the truth. *Bunting v. Ricks,* 22 N. C., 130; *Hulbert v. Douglass,* 94 N. C., 122; *Bryan v. Hodges,* 107 N. C., 492; *Hill v. R. R.,* 143 N. C., 539; *McIver v. Hardware Co.,* 144 N. C., 489. This just and reasonable doctrine has been applied in cases where it was sought to fix a creditor of a bankrupt or a purchaser from him with knowledge or notice of the latter's intent in dealing with him, or to show that the creditor or purchaser had reasonable cause to believe in the existence of the debtor's intent to prefer or to defraud. *Buchanan v. Smith,* 16 Wall., 277; *Wager v. Hall, ibid.,* 584; *Harrell v. Beall,* 17 Wall., 590. A creditor has reasonable cause to believe his debtor intends to prefer him when such a state of facts is brought to his attention as would lead a prudent man, when put on his guard, to the conclusion that such is his intent. *Toof v. Martin,* 13 Wall., 40; *Bank v. Cook,* 95 U. S., 342. Applying these principles to the facts of the case, it cannot be questioned, we think, that the defendant had at least reasonable cause to believe that the bankrupt intended to prefer her, as his creditor, when the payment was made. If we are to judge by what she did and by her own words, the transaction is condemned. She told the trustee that she was protected, and admitted to him that she had been informed of her preference as a creditor, asked that the money be paid to her—virtually asserting her right thereto—and received it from the trustee with the understanding that it was paid to her by reason of her preferential right as a creditor. The trustee stated that "She received it as money due her under the preference in the assignment." If the jury found these to be the facts from the testimony, under the instruction of the court, she had not only reasonable cause to believe that the money was paid with intent to prefer her, but actual notice of the fact; and it is not denied, nor could it be, that the money was, in fact, so paid to her. But in any view of the testimony, even if construed most favorably for the defendant, she had knowledge of facts and circumstances from which the law clearly implied notice.

But if the defendant is to be considered as having derived her right to the money from the assignee and under the assignment, the result will be the same. She necessarily knew that she had been preferred, and her title to the money must fail by the very terms of the bankrupt law.

Our conclusion is that there was no error committed in the trial below.

No error.

T. S. TAYLOR v. R. P. WAHAB.

(Filed 22 February, 1911.)

1. **Deeds and Conveyances—Trusts and Trustees—Parol Trust—Evidence Sufficient.**

   In an action to recover lands, defendant admitted the title to be in plaintiff by virtue of his being a grantee of defendant's sons, to whom the defendant had conveyed it by deed for a good and not for a valuable consideration. To establish the defense of a parol trust thereon in defendant's favor, there was evidence tending to show an absence of consideration moving from the sons to the plaintiff; that antecedent to the plaintiff's deed there was an agreement made between the sons and the plaintiff that the latter would hold the *locus in quo* for the use and benefit of defendant during his life, and there was evidence in corroboration that plaintiff had, since his deed, leased a portion of the land from defendant and had several times thereafter attempted to lease the land from him; that the lands comprised the homestead of the defendant, and he had continuously been in possession thereof, enjoying the rents and profits: *Held*, the evidence tended to show an agreement entered into prior to the execution of the deed and as a part of it, creating the parol trust, and was sufficient to sustain a verdict for defandant.

2. **Trusts and Trustees—Parol Trusts—Evidence—Instructions—Questions for Jury.**

   Where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for them to say whether it is "clear, strong, cogent, and convincing."

APPEAL by plaintiff from *Ward, J.*, at July Special Term, 1910, of HYDE.

W. C. Rodman and E. F. Aydlett for plaintiff.
W. M. Bond for defendant.

ALLEN, J. The plaintiff, T. S. Taylor, alleges in his complaint that he is the owner of about 200 acres of land in Hyde County, and that defendant is in the unlawful possession of about 60 acres thereof, which is particularly described in section 2 of the complaint. The defendant, R. P. Wahab, Sr., admits in his answer that the legal title to the land in dispute is in the plaintiff, and alleges in section 4 of the answer: "That some years ago he signed a deed purporting to convey to plaintiff (who had married his daughter) and to two sons of defendant the tract of land described in the complaint; that he was paid nothing for the same; that thereafter, for nominal consideration, as he is informed and alleges, the plaintiff procured deeds purporting to convey to him the interest of said two sons in said property, plaintiff agreeing with said sons before they made deeds to him that if they would convey to plaintiff their two-thirds interest in all said land that defendant should use, occupy and enjoy for his own benefit, as long as he lived, that part of said land described in section 2 of the complaint, with rents and profits of same, it being known as the R. P. Wahab, Sr., homestead; said deeds were made on the strength of said agreement and promise by plaintiff, and he has sold to other parties all the land he got by said deed except his homestead piece; that all the legal title that plaintiff ever acquired in any way to said land was made to him expressly subject to the right of defendant to use, occupy and enjoy the profits of that part of said land described in section 2 of the complaint, during his lifetime; that ever since the plaintiff acquired the legal title to any part of said property, plaintiff has held that part described in section 2 of complaint, charged with a trust affixed to it before the legal title passed, to the effect that this defendant should use and enjoy it for and during the term of his natural life."

The plaintiff filed a reply, denying section 4 of the answer. The following issue was submitted to the jury: "Was it understood that if R. P. Wahab, Jr., and James S. Wahab would execute the deeds of 20 May, 1904, to plaintiff T. S. Taylor, that R. P. Wahab, Sr., should have a life estate for himself in the whole of the lands described in section 2 of the complaint, and did said plaintiff take said deeds with said understanding and agreement? Answer: Yes."

Judgment was rendered in favor of the defendant, and the plaintiff appealed, relying on two exceptions.

One of these exceptions is to the refusal of the judge to charge the jury, "That upon all the evidence they should answer the issue, 'No,'" and the other to the charge of the judge as to the quantum of proof required of the defendant to establish the parol trust alleged by him, which was as follows: "That it was their duty to answer the issue 'No,' unless the defendant had shown by clear, strong, cogent, and convincing evidence that plaintiff procured execution of deeds to him from James Wahab and R. P. Wahab, Jr., by a promise and agreement on his part, before said deeds were made, that defendant should use, occupy, and enjoy said land described in section 2 of complaint, and its rents and profits, for term of his natural life; that if defendant had so shown by such evidence as above stated, they should answer the issue, 'Yes.'"

In our opinion, the evidence introduced by the defendant meets every requirement of the law.

R. P. Wahab, Jr., named in the issue and one of the grantors to the plaintiff, testified as follows: "That prior to the time he and his brother, James S. Wahab, made deed to plaintiff, said plaintiff agreed that if they would make the deed, that their father, the defendant, should have the right to use and occupy as long as he lived that part of said land described in section 2 of complaint, and to receive the rents and profits thereof for his (defendant's) own use and benefit; that he and his brother, James S. Wahab, made said deed by reason of and upon the strength of said agreement; that Taylor paid them nothing; that he made the agreement with Taylor at Scranton, his father not being present; that no one else was present; that he informed his brother; that he and his brother made the deeds to Taylor because of and upon the strength of said agreement; that the piece of land described in section 2 of complaint was known as R. P. Wahab, Sr., homestead; that his father has ever since remained in possession and received the rents and profits of said homestead; that Taylor has rented part of said homestead from his father since said deeds were made, and paid him rents for same."

One Garrish testified that he bought some of the land outside of the homestead tract from Taylor, and that Taylor stated to him he would sell him the homestead when he came into possession of it; and at another time Taylor stated to him that he would sell him the homestead subject to life right of R. P. Wahab, Sr. These conversations were since James Wahab and his brother made the deeds to Taylor.

One Alexander testified that in the year 1909 he heard plaintiff say he would give defendant $1,000 and board for a six-year lease of the homestead.

James Wahab testified: That plaintiff asked him last year if he didn't think defendant was a fool not to accept $600 and give up the homestead; said he had offered him that to surrender possession.

R. P. Wahab, Sr., was sworn, and testified that he received nothing for the deed he made to Taylor and his sons; that soon after his sons made the deeds to Taylor, R. P. Wahab, Jr., told him "he and James Wahab had conveyed to Taylor because it was agreed by Taylor that I should have a life right in the homestead. Taylor has rented from me and has always told me it was mine for life; wanted to rent it again; I refused, and he started suit."

One Ellickson testified: Last year Taylor wanted me to make him some carts. Soon after he told me he would not need the carts, as defendant would not sell him his life right in the homestead; said he offered him $1,000 for a six-year lease on it; Taylor also said he would not have barn repaired, as it was on defendant's land; the barn was on the homestead.

The defendant also offered evidence that James Wahab, named in the issue, was sick and could not attend court. The defendant has been in possession of the land since the execution of the deed to the plaintiff in 1894.

The plaintiff introduced evidence to the contrary, and, as a witness in his own behalf, denied the agreement and explained the possession of the defendant; but he admitted upon his cross-examination "that he rented part of the homestead property from defendant since the deeds were made and paid him $50 and board for it"; "that he did offer a piece of land worth $750 to get defendant to give up possession of homestead," and he refused to deny the conversations testified to by the witnesses for the defendant, Garrish and Ellickson.

We have much more than declarations admitting a trust antecedently created. We have evidence of an agreement entered into prior to the execution of the deed and as a part of it, testified to by one of the parties to the agreement; evidence of declarations of the plaintiff that he would sell the land subject to the life right of the defendant; that he would give defendant $1,000 and board for a six-year lease of the land; that he had offered defendant $600 to surrender possession of the land; evidence that plaintiff had rented part of the land from the defendant and had paid him rent, and the fact that the defendant had been in possession of the land six years after he (the plaintiff) received his deed before this action was commenced.

In *Smiley v. Pearce,* 98 N. C., 189, *Chief Justice Smith* says: "The declarations held to be insufficient themselves to show a trust which a court will enforce are such as are but admissions of a trust antecedently created, but do not include such as create and annex the trust to the legal estate," and this is cited with approval in *Hemphill v. Hemphill,* 99 N. C., 442. The evidence of R. P. Wahab, Jr., as to the agreement with the plaintiff, was such as creates and annexes the trust to the legal estate, and there was much evidence in corroboration.

We also think there was no error in the charge of his Honor, and that the rule laid down for the guidance of the jury, as stated in the part of the charge quoted, follows the decisions of this Court. *McNair v. Pope,* 100 N. C., 408; *Hamilton v.*

Buchanan, 112 N. C., 471; *Kelly v. McNeill*, 118 N. C., 353; *Wilson v. Brown*, 134 N. C., 405. It is well settled in this State that where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for the jury to say whether it is "clear, strong, cogent, and convincing." *Cobb v. Edwards*, 117 N. C., 253; *Lehew v. Hewitt*, 130 N. C., 22; *Avery v. Stewart*, 136 N. C., 430.

The enforcement of parol trusts is recognized in this State, but it is a jurisdiction in the exercise of which there is much danger. As said by *Pearson, J.*, in *Kelly v. Bryan*, 41 N. C., 286: "Courts of equity enforce parol trusts to prevent fraud, but the jurisdiction is exercised sparingly and, many think, with very doubtful policy." *Justice Walker*, in *Avery v. Stewart*, *supra*, while discussing the rule as to the proof required, says: "The security of titles required the adoption of this rule." As a further safeguard, the law clothes the presiding judge with the power to supervise the verdict and to set it aside in proper cases.

The doctrine is fully and clearly discussed in the case of *Avery v. Stewart*, cited above, and in the case of *Sykes v. Boone*, 132 N. C., 199, both of which are conclusively against the plaintiff. We find no error, and the judgment is

Affirmed.

KATHRYN M. HOWARD v. J. H. HARRIS PLUMBING COMPANY.

(Filed 22 February, 1911.)

1. Negligence—Master and Servant—Acts of Clerk—Respondeat Superior.

The plaintiff was employed in the store of A. and was injured by falling through an open trap-door, usually closed and concealed beneath a movable counter. A. had requested the defendant to do some repair work in the basement of the store, and on this occasion a clerk of A., under A.'s instruction, had shown the workman of defendant the way to his work, had opened the trap for him to descend, and was informed by the workman that he would be in the cellar an hour or two. The clerk failed to close

the trap or to guard the opening against accidents, and thus the injury complained of was occasioned: *Held*, as A. had the complete control and management of his own store, he was responsible in damages for the negligence of his clerk in not closing or safeguarding the open trap; that this negligence was the proximate cause of the injury, and under the evidence a motion of nonsuit should have been granted.

2. **Negligence—Joint Tort Feasors—Release as to One—Effect.**
A release of one or more joint tort feasors executed in satisfaction for an injury received from their joint negligent act is a discharge of them all.

APPEAL from *Ferguson, J.*, at May Term, 1910, of BEAUFORT.

Civil action for damages. These issues were submitted:

1. Was the plaintiff injured by the negligence of the defendant, as alleged? Answer: Yes.

2. Did plaintiff, by her own negligence and acts, contribute to her injury? Answer: No.

3. Did the release of plaintiff for a valuable consideration to E. W. Ayers from liability also relieve the defendant from liability? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover? Answer: $750.

From the judgment rendered, the defendant appealed.

Nicholson & Daniel for plaintiff.
W. C. Rodman for defendant.

BROWN, J. Although there are twenty assignments of error, the merits of this appeal can be passed on in considering the motion to nonsuit.

It is admitted that E. W. Ayers is the owner and proprietor of a large store in Washington, North Carolina, in which he conducts a mercantile business, and that plaintiff was his employee in the millinery department. Ayers employed defendant to send a workman to his store for the purpose of descending into the cellar and putting in a water pipe. The only entrance to the cellar, which was dark, was a trap-door in the floor of the store, over which a movable counter stood. From this trap-door a ladder was used to descend into the cellar.

The counter was moved, the trap-door opened, and the workman, one Cherry, sent by defendant to fix the water pipe, descended with his lantern and tools into the cellar and went to work. The trap-door was not closed after Cherry descended into the cellar, and the plaintiff in passing by fell in and was injured.

There are two reasons why the nonsuit must be sustained.

1. There is no evidence of negligence upon the part of the defendant. It obeyed the call and sent one of its workmen to Ayers' store, as directed. It was Ayers' duty to conduct the workman to the place where the work was to be done. It was Ayers' store and he had complete control and management of it. He knew the way into the cellar, and the workman did not. Ayers was offered as a witness for plaintiff, and admits that he undertook this duty. He directed one of his clerks to show Cherry the way into the cellar through the trap-door.

When Ayers delegated this duty to his clerk he was responsible for the manner in which he discharged it. *Tanner v. Lumber Co.,* 140 N. C., 475.

When the workman lighted his lantern and descended by the ladder into the cellar it was the clerk's duty to either close the door or, if necessary to leave it open while the work was being done, to protect it so those passing by were not likely to fall into the cellar.

The evidence for plaintiff is not aided any by that offered by defendant. According to Cherry's evidence, Ayers told him that one of his clerks would show him the way into the cellar; that the clerk opened the trap-door and told him to enter, which he did; that he then told the clerk he would be in the cellar an hour or two, and that the clerk could shut the trap-door.

Taking the evidence in its most favorable view for plaintiff, we are unable to see any negligent act upon the part of the defendant.

The proximate cause of her injury was the neglect of Ayers' agent, after conducting the workman (as directed by Ayers) into the cellar and, after the workman was down in the cellar, in failing to close the trap, as it was his duty to do.

2. Assuming that this defendant is jointly liable with Ayers

to the plaintiff, she has released Ayers for a valuable consideration paid to her by him, and that releases this defendant.

She cannot be allowed to recover two compensations for the one injury. If she recovers of one she cannot recover of the other. It is immaterial, so far as plaintiff is concerned, to consider which joint tort feasor is primarily liable.

The question of primary and secondary liability is for the offending parties to adjust between themselves. The injured party has his remedy against either. *Dillon v. Raleigh,* 124 N. C., 188; Bushwell Personal Injuries, sec. 190.

It is well settled that a release of one or more joint tort feasors executed in satisfaction for an injury is a discharge of them all, on the ground that the party can have but one satisfaction for his injury. 24 Am. and Eng., 306, where cases from nearly all the American courts are collected. *Brown v. Louisburg,* 126 N. C., 701; *Burns v. Womble,* 131 N. C., 173.

Citing a wealth of authority, English and American, Judge Cooley says: "It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all. And so a release of one releases all, although the release expressly stipulates that the other defendants shall not be released. And this rule is held to apply even though the one released was not in fact liable. It does not lie in the mouth of such a plaintiff to say he had no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury."

The release in question is set out in the record and its execution admitted by the plaintiff in her testimony. It purports to release and discharge Ayers on account of this injury and is based upon a valuable consideration, and it is not contended that it was secured by fraud.

Upon practically all the authorities, this act of plaintiff released this defendant as well as Ayers.

We are therefore of opinion that in no view of the evidence can the plaintiff recover.

The motion to nonsuit is sustained and the action is dismissed.

Reversed.

L. H. HORNTHAL v. W. H. HOWCOTT AND MACK LINYEAR.

(Filed 22 February, 1911.)

Deeds and Conveyances—Reservations—Timber Deeds—Interpretation.

The plaintiffs conveyed by deed certain described standing timber on their lands not less than 11 inches on the stump when cut, with the right to enter and to cut and to remove said timber within four years from the date of the deed; and thereafter, but before the expiration of the four years given for the cutting and removal of the timber, they conveyed to the defendant the lands described in the deed for the timber, with a provision, after describing the lands, "that the certain timber had been previously sold, etc., and is excepted from this deed." This action involves the title to the timber embraced in the timber deed and not cut and removed within the period of time therein specified, as between the grantor and grantee in the deed for the lands: *Held*, the intent of the grantor is to be gathered from the two deeds, and the legal effect of the deed to the defendant is to convey the land and all the timber thereon not cut and removed by the grantee in the timber deed, in accordance with its provisions, within the four years therein named.

APPEAL by defendants from *J. S. Adams, J.*, at Fall Term, 1910, of WASHINGTON.

The facts are sufficiently stated in the opinion by *Mr. Justice Allen.*

W. M. Bond and W. M. Bond, Jr., for plaintiff.
Gaylord & Gaylord for defendants.

ALLEN, J. This action was instituted to determine the title to certain pine and poplar timber standing on the land described in the complaint. The plaintiffs are L. H. Hornthal and Flora Sheleeman, who is the only heir at law of Louis Hornthal, deceased. It appears from the record that prior to 5 May, 1900, L. H. and Louis Hornthal were the owners of said land, and that on that day they executed to the John L. Roper Lumber Company a deed by which they conveyed all the pine and poplar timber on said land, not less than 11 inches on the stump when cut, with the right to enter and to cut and remove said timber within four years from the date of the deed, and that on 30 October, 1902, they (L. H. and Louis Hornthal) executed a deed to the defendants, by which they conveyed the tract of land on which the timber conveyed to the Roper Lumber Company was situate. This last deed to the defendants contains the following provision, after the description of the land, upon which the settlement of the controversy depends: "The pine and poplar timber having been previously sold to the John L. Roper Lumber Company, and is excepted from this deed." The case was submitted to the Superior Court on these facts, the defendants reserving certain exceptions to the refusal of the judge to admit evidence offered by them, which need not be considered.

The plaintiffs contend that the effect of the provision in the deed to the defendants is to except from the operation of the deed all the pine and poplar timber on the land measuring 11 inches and more, and that they are the owners of all of said timber not removed in four years, and defendants say that it excepted the timber conveyed to the Roper Lumber Company, and that the timber conveyed was such as was cut in four years, and that all of the timber not cut and removed in four years passed to them under their deed. The judge presiding at the trial sustained the contention of the plaintiffs, and in this we think there is error.

The object of courts in the construction of a paper-writing is to discover what the parties to it intended, and whether apt language has been used to give effect to the intention. Ordinarily, this must be gathered from the paper itself; but every act has its connections and associations, and to be understood must be placed in its appropriate setting. At the time the deed to the defendants was executed, the four years within which the Roper Lumber Company had the right to cut and remove the timber had not expired, and there is nothing to indicate that they did not expect this right to be exercised. The plaintiffs were executing a deed conveying the land to the defendants, and they had previously executed a deed to the Roper Lumber Company, conveying timber, and were familiar with its terms. They knew it was usual to fix the time within which the timber could be removed, and to reserve the right to enter for the purpose of cutting and removal. It is true, it is not necessary to state any time within which the timber is to be removed, in a deed conveying the land and reserving the timber, and that the grantor in such deed "is not providing for timber cutting, but reserving a right, and should be entitled to hold till this is put an end to by the grantee's giving notice for a reasonable time, so that the grantor may elect to cut or sell this right to another." *Mining Co. v. Cotton Mills,* 143 N. C., 308, and that the grantor has the right to enter for the purpose of removal, without expressly reserving it (Am. and Eng. Enc. L., vol. 28, p. 543); but it is not probable, if the plaintiffs thought they had any interest in the timber, that they would have left important rights like these to depend on judicial construction, knowing, as they did, that similar provisions were in the deed they executed and that they were inserted to protect the rights of the owner of the timber. The deed contains covenants of seizin and warranty and one against encumbrances, and the purpose of the parties in inserting the provision under consideration was to protect the grantor against these covenants, the deed to the Roper Lumber Company being regarded as an encumbrance.

The language of the exception seems to put the matter at rest. It is: "The pine and poplar timber having been previously sold to the John L. Roper Lumber Company, and is excepted from this deed." If, then, we determine what timber had been previously sold to the Roper Lumber Company, we fix the scope and extent of the exception. In speaking of a timber deed like this, *Justice Hoke* says, in *Hawkins v. Lumber Co.,* 139 N. C., 162: "The true construction of this instrument is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed"; and this statement of the law is approved in *Lumber Co. v. Corey,* 140 N. C., 467.

It follows from this construction, that at the expiration of four years, under the terms of the deed, the Roper Lumber Company had no title to the timber not removed, and that the effect of the deed was to convey to the lumber company all the pine and poplar timber cut and removed within four years, and no more. The exception is no broader than this. Therefore, the deed of the plaintiffs to the defendants conveys the land and all the pine and poplar timber not cut and removed by the Roper Lumber Company within four years from the date of the deed to it.

The case of *Strasson v. Montgomery,* 32 Wis., 52, seems to be directly in point. In that case one Gleason, who was the owner in fee of the lands, conveyed the timber thereon to one White, on 4 December, 1866, and gave him four years within which to remove it. In September, 1867, the said Gleason conveyed the land to the plaintiff Strasson, by deed containing the following provision: "excepting and reserving a certain amount of timber heretofore sold Elias N. White." White conveyed his interest in the timber to the defendant, who entered after the expiration of the term of four years and cut the timber, and the plaintiff sued to recover damages. It was held that the plaintiff was entitled to recover. The Court says, on page 57: "The former conveyance was of all trees and timber on the premises, with the proviso that White should take the same off the land within four years, or by 4 December, 1870. It is well settled, on principle and by authority, that the legal effect of the instrument is that Gleason thereby conveys to White all of the trees and timber on the premises which White should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to Gleason or to his grantee of the premises. Having thus ascertained what Gleason conveyed to White, we are next called upon to determine the legal effect of the exception or reservation in the deed to the plaintiff. The language is, 'excepting and reserving a certain amount of timber heretofore sold to Elias N. White.' But we have already seen that the timber sold to White was only such as he should take off the premises by 4 December, 1870. Hence, the timber remaining on the premises after that date is not included in the above language, and is not excepted or reserved at all."

This case is cited with approval in *Bunch v. Lumber Co.,* 134 N. C., 121, and in *Hawkins v. Lumber Co.,* 139 N. C., 163. In *Bunch's case, Justice Walker,* speaking for the Court, quotes with approval the following language from the *Strasson case:* "It is well settled, on principle and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises." The defendants in this case are grantees of the premises, under a deed from the plaintiffs, and we conclude that the legal effect of that deed is to convey to the defendants the land and all the timber thereon not cut and removed by the Roper Lumber Company within four years from the date of its deed.

Reversed.

W. W. S. WATERS v. THE DENNIS SIMMONS LUMBER COMPANY.

(Filed 22 February, 1911.)

1. **Trespass—Possession—Superior Title.**

   Though trespass is a personal and possessory action, the law adjudges the possession to be in him who has the superior title, when neither party has the actual possession at the time of the alleged unlawful entry.

2. **Trespass—Calls—Description—Punctuation—Established Lines—Interpretation of Deeds.**

   In an action of trespass on lands, the question of defendant's unlawful entry depended, under the construction of the calls in a grant under which he claims title, upon the question whether the second call was controlled by a call to the "Morris line" according to the following description: "Beginning at a pine on W. Creek or Gum Swamp at L.'s corner (this point being admitted), running thence south 41½ degrees west 12⅗ chains; thence south 20½ degrees west 18¼ chains, along Morris's line south 16½ chains," etc. The plaintiff contends that the second call should be run with the Morris line, making a difference of 92 degrees in the two courses: *Held*, (1) the first call not mentioning the "Morris line," makes it probable, at least, that it was not to reach that line; (2) it was not intended that the second call should be "along the Morris line," as the words quoted are separated by a comma from those of the second call, and qualify the third call for course and distance, there also being evidence that the description fits a location of the "Morris line" under the third call; therefore, (3) the rule that, under certain conditions, a call for an established line of an adjoining tract of land will control a conflicting call for course and distance has no application.

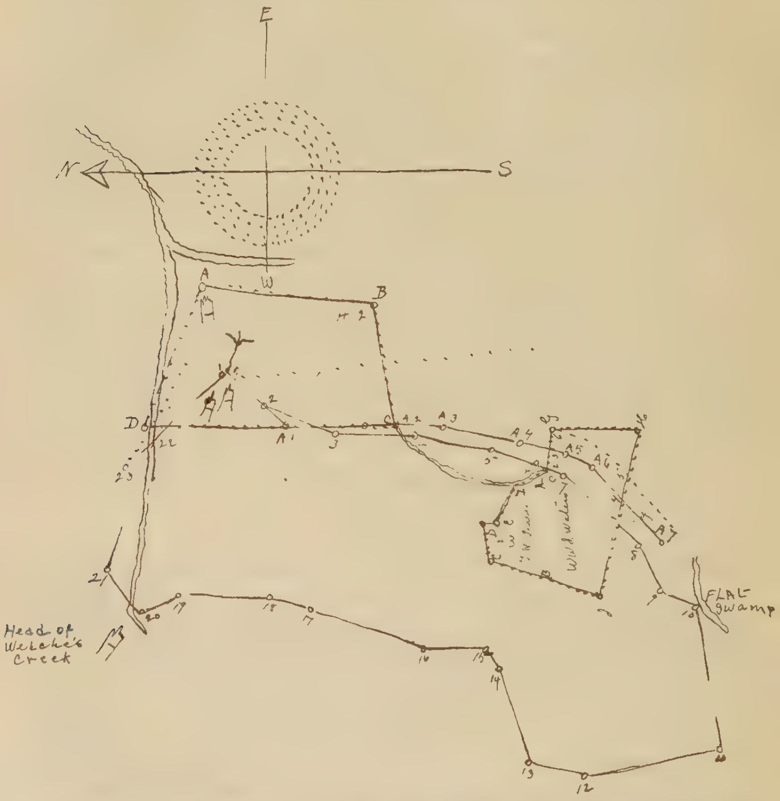
APPEAL by plaintiff from *J. S. Adams, J.*, at October Term, 1910, of WASHINGTON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Ward & Grimes for plaintiff.
Gaylord & Gaylord for defendant.

WALKER, J. This action was brought to recover damages for a trespass on land. While trespass is a personal and possessory action, if neither party has the actual possession at the time of an alleged unlawful entry, the law adjudges the possession to be in him who has the superior title. *McCormick v. Monroe,* 46 N. C., 13; *Drake v. Howell,* 133 N. C., 162; *Gordner v. Lumber Co.,* 144 N. C., 110. There being no evidence of actual possession, the plaintiff sought to recover by reason of his constructive possession arising from the title which he alleges had been acquired and was held by him at the time of the defendant's entry upon the land, under a grant issued by the State to him 20 November, 1890. The defendant justified under a grant issued to Harry W. Stubbs, 18 August, 1887, he having acquired the title of the grantee by mesne conveyances.

The plaintiff's grant included the *locus in quo.* It was admitted that the Stubbs grant also covered the *locus in quo,* if its lines and boundaries had been correctly located and run as shown on the blue map, and that the defendant's entry in that event was lawful; but the plaintiff contended that the first call of the Stubbs grant required that the first line should be run



from Leggett's corner on Welche's Creek or Gum Swamp to the "Morris line," and the second line should not be run according to the course given in the grant, but with the "Morris line" the prescribed distance, and the other lines should be run according to the calls of the grant to the beginning. The case, therefore, turns upon the question whether the call for the

"Morris line" should control the location of the second line of the Stubbs patent. The calls in that grant are as follows: "Beginning at a pine on Welche's Creek or Gum Swamp at Luke Leggett's corner, running thence south 41½ degrees west 12⅗ chains; thence south 20½ degrees west 18¼ chains, along Morris's line south 16½ chains; thence south 10½ degrees west 18½ chains, south 15½ west 11¼ chains," and thence with the remaining calls of the grant to the first station. There was no dispute as to the beginning corner. If the second line is run as the plaintiff contends it should be, that is, with the Morris (or Carkeet) line, the course will be north 67½ west, instead of south 20½ west, which is the call of the Stubbs grant, making a difference in the two courses of 92 degrees. It also appears from the official map annexed to the grant, that the lines therein indicated were run by the surveyors, who made the survey and map, as the defendant now contends they should be.

The general rule is that in the absence of calls for natural or artificial objects or monuments, a call for a known and established line of an adjoining tract of land will control another and conflicting call for course and distance, because such a call is deemed to be the more certain. *Cherry v. Slade,* 7 N. C., 82; *Bowen v. Gaylord,* 122 N. C., 816, where many authorities are cited. See, also, *Lance v. Rumbough,* 150 N. C., 19; *Mitchell v. Welborn,* 149 N. C., 347; *Bowen v. Lumber Co.,* 153 N. C., 366; *Whitaker v. Cover,* 140 N. C., 280. There are exceptions to the general rule, as will appear in the cases cited, but they are not relevant to this discussion. The natural object or line called for must, of course, be located or identified with reasonable certainty. *Hauser v. Belton,* 32 N. C., 358. The plaintiff in this case relies upon these settled rules for the ascertainment of boundaries, but we do not think they are applicable when the language of the Stubbs grant is properly construed and the call for the Morris line is considered with reference to the context. In the first place, it should be observed that in the first call, "south 41½ degrees west 12⅗ chains," there is no mention of the Morris line; and it is at least probable that if the call was intended to reach that line, it would have been so stated. The omission, though, is not by any means conclusive and does not fully answer the plaintiff's contention, but it may aid us to reach the true meaning of what immediately follows. It seems to us, and we so decide, that it was not intended that the second call should be "along the Morris line," as the words just quoted are separated by a comma from those of the second call and apparently qualify the third call for course and distance. There also is evidence in the case that there is a line of the Morris (or Carkeet) tract corresponding with the third call by course and distance of the Stubbs grant; but whether there is or not, the Morris line is evidently mentioned, not in the second, but in the third call, and this being so, the plaintiff's contention can derive no support from the rules of law we have stated above. While we interpret the Stubbs grant by its own language, without the aid of any extraneous facts, the evidence in the case tends most strongly, if not convincingly, to establish the correctness of our conclusion.

The court was of the opinion, and so charged the jury, that the second line of the Stubbs grant must be run according to course and distance, which should not be deflected or controlled by the call in the grant for the Morris line, that line being mentioned only in the third call. If the second line is thus run, the senior (or Stubbs) grant will cover the *locus in quo,* and the defendant had the title and, therefore, the constructive possession at the time of its actual entry upon the land. Having the right of possession and the right of property, its entry was not unlawful.

Under the instruction of the court, which we hold was correct, the verdict and judgment were properly rendered for the defendant.

No error.

J. W. TWIDDY v. DARE LUMBER COMPANY.

(Filed 22 February, 1911.)

1. **Railroads—Fellow-servant Act—Scope—Interpretation of Statutes.**

While the provisions of the Fellow-servant Act, Revisal, sec. 2646, do not extend to a railroad in process of construction before it is operated as a railroad, it does apply, when the railroads are in operation, to their employees in the course of any department of the work embraced in or incidental to the operation of the road.

2. **Same—Lumber Roads.**

The provisions of the Fellow-servant Act, Revisal, sec. 2646, apply to lumber roads that operate a railroad, and with full force and effect to all their employees in the course of their service in the operation of the railroad, or any department of it.

3. **Same.**

The provisions of the Fellow-servant Act do not extend to employees of a lumber company who are not connected with the operation of a railroad of the company.

4. **Same—Evidence—Actionable Negligence—Accident.**

Plaintiff in the line of his duty was sawing at one end logs for the defendant, at its lumber plant, which logs were to be placed on defendant's railroad car by appliances run by steam, known as a "skidder" and a 'loader." The other ends of the logs were sawed by other of defendant's employees, and the negligence complained of was the failure of these other employees to give plaintiff notice that a log, which rolled upon plaintiff, to his injury, was about to do so. There was no evidence that plaintiff was a part of a train crew or directly engaged in operating the "skidder" or the "loader": *Held*, the Fellow-servant Act, Revisal, sec. 2646, has no application. *Semble*, the injury resulted from an accident, and there was no actionable negligence shown on the part of the defendant.

APPEAL from *J. S. Adams, J.*, at Fall Term, 1910, of DARE.

Civil action to recover damages for injury caused by alleged negligence on the part of defendant company.

The jury rendered the following verdict:

1. Was plaintiff injured by the negligence of defendant, as alleged? Answer: Yes.

2. Did plaintiff contribute to his own injury by his negligence, as alleged in the answer? Answer: No.

3. Was the defendant injured by the negligence of a fellow-servant, as alleged in the answer? Answer: ....

4. What damage, if any, is plaintiff entitled to recover? Answer:

Damages up to the present time............	$1,000
10 years, 200 days to the year, $1.00 per day...	2,000
5 years, 200 days to the year, .75 per day...	750
5 years, 200 days to the year, .50 per day...	500
	$4,250

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

B. G. Crisp and Winston & Matthews for plaintiff.
Ward & Grimes and D. M. Stringfield for defendant.

HOKE, J. The evidence tended to show that defendant, an incorporated lumber company, under its charter and in furtherance of its business was operating a steam railroad, the chief purpose being to carry the logs from the woods to defendant's mill. That on or about 2 October, 1908, the plaintiff, an employee of the company, was seriously injured, while engaged in sawing logs in a loading yard of the company. That in this part of the work the custom was that after or as the timber was felled in the woods, the logs were dragged to a convenient position near the railroad track by means of a skidder, a stationary machine placed close to the track, operated by steam, and in connection with this machine, or as a part of it, there was also a "loader" which picked up the logs and placed them on the cars after they had been sawed into proper lengths for the purpose. That plaintiff was one of a gang of hands engaged in sawing these logs into the lengths required, and at the time of the injury he, with another hand, was working on a log with a cross-cut saw and was hurt by the log's rolling around on his leg and crushing it, the log having been cut through at the other end by two hands engaged in a like service. The negligence imputed to defendant was the failure of the employees at the other end of the log to give plaintiff proper and timely warning that the log was about to roll, and the objection chiefly urged to the validity of the trial was that in determining the question of defendant's responsibility in this aspect of the evidence, the judge allowed the jury to consider the case as affected by our statute in reference to negligence of fellow-servants. This statute, Revisal, sec. 2646, on matters relevant to the present inquiry, provides, "That any servant or employee of any railroad company operating in the State, who shall suffer injury to his person . . . in the course of his services or employment with such company by the negligence, carelessness, or incompetence of any other servant, employee, or agent of the company, etc., . . . shall be entitled to maintain an action against such company."

Construing this statute, the Court has frequently held that its force and effect was to abolish, so far as railroads were concerned, the doctrine known as the fellow-servant doctrine, and make the company responsible for the negligent acts of its employees in the course of their service and employment. *Mabry v. R. R.*, 139 N. C., 388. And we have held further, that while the act does not extend to a railroad company in process of construction and before operations commence (*O'Neal v. R. R.*, 152 N. C., 404; *Nicholson v. R. R.*, 138 N. C., 516), as to all railroads being operated in the State, it applies to their employees in the course of any department of the work embraced in or incidental to the operation of the road. Referring to this question in *Nicholson's case, supra*, the Court, among other things, said: "In *Mott v. R. R.*, 131 N. C., 237, it was sought to curtail and restrict the act so that it should apply only to railroad employees engaged in operating trains, but the Court held to the contrary, and said, 'the language of the statute is both comprehensive and explicit.' It embraces injuries sustained by (quoting the act) 'any servant or employee of any railway company . . . in the course of his services or employment with said company.' The plaintiff was an employee and was injured in the course of his service or employment." In that case the plaintiff, working in the repair shops, was injured by the negligence of a fellow-servant while removing a red-hot tire from an engine, and it was held that he could recover. The same ruling was repeated in *Sigman v. R. R.,* 135 N. C., 184, where it is said: "The plaintiff was injured by the negligence of a fellow-servant while working upon and repairing a bridge of the defendant railroad. It is settled that the fellow-servant law, chapter 56, Private Laws 1897, applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service."

The Court has also held in many well-approved decisions that these lumber roads, to the extent that they operate a railroad, are and should be considered as railroads, and that the statute in question as construed and applied extends in full force and effect to all employees in the course of their service in the operation of the company's railroad or any department of it. *Thomas v. Lumber Co.,* 153 N. C., 351; *Blackburn v. Lumber Co.,* 152 N. C., 361; *Bissell v. Lumber Co.,* 152 N. C., 123; *Snipes v. Mfg. Co.,* 152 N. C., 42; *Sawyer v. R. R.,* 145 N. C., 27; *Hairston v. Leather Co.,* 143 N. C., 512; *Liles v. Lumber Co.,* 142 N. C., 39; *Hemphill v. Lumber Co.,* 141 N. C., 487; *Simpson v. Lumber Co.,* 133 N. C., 96; *Craft v. Lumber Co.,* 132 N. C., 156. But this position, though fully established and sustained by these and many other decisions that could be cited, does not extend the effect of the fellow-servant statute to employees of lumber companies, who are in no way connected with the operation of these railroads. The act, in terms, uses the words "railroad companies," and no other, and may not be applied to employees who are engaged in the lumbering features of the business. In the case before us, as we interpret the testimony, the plaintiff was properly in the lumbering department of the business. So far as the evidence now discloses, he was not a part of the train crew, nor was he directly engaged in operating either the skidder or the loader, and, while he was at the time at work on a loading yard, he was, as stated, engaged in the lumbering features of the work and could, in no proper sense, be considered an employee of a railroad or any department of it. We are of opinion, therefore, that the act in question has no application, and there was error in allowing the jury to determine the question of defendant's responsibility as in any way affected by it.

While we have specially considered and passed upon the operation of the fellow-servant act, because that was the exception chiefly discussed before us, we deem it not amiss to say that, on the facts as they now appear, there does not seem to have been an actionable wrong established against the defendant company, but the evidence tends rather to disclose one of those unfortunate but unavoidable accidents which sometimes occur in heavy work of this character and bringing the case within the principle considered and applied in several recent decisions of the Court, as in *Brookshire case,* 152 N. C., 669. For the error indicated, then, defendant is entitled to a new trial, and it is so ordered.

New trial.

EDITH ASHE v. CAMP MANUFACTURING COMPANY.

(Filed 22 February, 1911.)

1. **Estates—Illegitimates—Inheritance—Interpretation of Statutes.**
   Revisal, sec. 1556, Rules 9 and 10, does not restrict the principle that "all illegitimates" have the same right of inheritance as between themselves "as if legitimate," but broadly reiterates the doctrine in the most unambiguous terms.

2. **Same—"Half Blood"—Mother.**
   There is no half blood between illegitimates, and they take by descent only through their mother. The statute regulates the descent of the realty of illegitimates who die intestate, without reference to the father. Revisal, sec. 1556.

3. **Estates—Illegitimates—Inheritance—Prohibited Marriages—Races—Constitutional Law—Interpretation of Statutes.**
   The constitutional prohibition (Art. XIV, sec. 6) of marriages between the races does not affect an illegitimate brother's inheriting the estate of an intestate whose father was a negro and

mother a white woman; and the fact that the intestate could not be treated "as if born in lawful wedlock," Revisal, sec. 1556, Rules 9 and 10, has no application.

BROWN, J., dissenting.

APPEAL by plaintiff from *Justice, J.*, at November Term, 1910, of NORTHAMPTON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Mason & Worrell and W. H. S. Burgwyn, Jr., for plaintiff.
Peebles & Harris and Gay & Midyette for defendant.

CLARK, C. J. Jesse Hasty, who was the illegitimate son of a white mother by a negro father, died intestate in 1888, seized of the premises. He left a widow, but no children and no brother or sister, except Henry Hasty, the illegitimate son of his mother by a white father. The dower was not allotted. The widow remarried in 1891 and removed from the premises, leaving a tenant in possession. Henry Hasty died in 1898. His heirs at law sold the timber on the land to the defendant. This is an action by the remarried widow for trespass against the defendant for cutting the timber, and otherwise. There is no question of dower, as the defendant admitted the right of plaintiff thereto and offered to submit to judgment for the allotment of dower.

Revisal, sec. 1556, Rules 9 and 10, are conclusive of the right of Henry Hasty to inherit. The plaintiff rests her contention on the words in Rule 10, that the estate of illegitimate children "shall descend accordingly in the same manner as if they had been born in wedlock." The previous words are "illegitimate children shall be considered legitimate as between themselves." The sentence above quoted, which follows, uses the word "accordingly," showing that the intention was in no wise to restrict the broad principle that all "illegitimates" have the same rights "as if legitimate," between themselves, but to broadly reiterate it, in the most unambiguous terms.

The contention of the plaintiff, that as marriage between the white mother and negro father of Jesse Hasty was forbidden

(Const., Art. XIV, sec. 8), therefore the descent could not be cast upon Henry Hasty because Jesse could not be treated "as if born in lawful wedlock," cannot be sustained. There is no half blood between illegitimates; their descent is only through the mother. The act does not purport to validate such illicit unions. It merely regulates the descent of the realty of illegitimates who die intestate.

There is no intimation in the statute of an intention to divide illegitimates into two classes—those whose parents might have married and those who could not. An illegitimate is *nullius filius*—a son without a father—in the eye of the law. The law takes no notice of the status or the color of the father. The law, in such cases, traces descent only through the mother. Jesse Hasty was no less illegitimate because his parents were of different color. To hold otherwise would repeal altogether the law of descent among illegitimates as to all mulattoes, for their parents cannot legally marry. It would also repeal it in all cases where the children, whether mulatto, black, or white, are the offspring of a married man, by a woman not his wife. This would make a third class of illegitimates. It is true, that if the lawful wife die, the husband could, in some cases, marry his paramour (as was argued), but that would not legitimate the previous offspring.

We discover in the law no intention to divide illegitimates into several classes. All illegitimates are treated as children without a father of any kind. The law takes no notice of him, for they trace only through the mother, and for the purpose of inheriting property, the illegitimate children of the same mother are legitimate, as between themselves.

The judgment of nonsuit is
Affirmed.

BROWN, J., dissenting.

J. H. LEE v. W. H. MANLEY.

(Filed 1 March, 1911.)

1. **Debtor and Creditor—Payment—Application.**
When the debtor owes two debts, one secured and one not secured, his right to direct the application of a payment made to the creditor must be exercised at the time the payment is made.

2. **Same—Change—Consent of Debtor.**
If a debtor fails at the time of payment to direct its application when he owes the creditor a secured and an unsecured debt, the creditor may apply it to either debt, or a part thereof to one and the remainder to the other; and when the application of the payment is once made by the creditor, the assent of the debtor is necessary for him to then change it.

3. **Debtor and Creditor—Payment—Application by Law.**
When the debtor owes the creditor two debts, one secured and one not secured, and makes the creditor a payment without directing it to either debt, and the creditor himself does not make the application, the law will apply the payment to the unsecured debt.

4. **Debtor and Creditor—Mortgage—Proceeds—Payment—Application—Question for Jury.**
When the debtor owes a debt secured by a chattel mortgage, and another debt not secured, and makes payment to his creditor, with a part of the proceeds of the property secured by the mortgage, of which the creditor was aware, the execution of the mortgage was an application of the payment upon the debt it secured, which the creditor cannot change without the debtor's consent, and upon conflicting evidence presents a case for the jury upon the issue.

5. **Debtor and Creditor—Mortgage—Tender—Payment—Application.**
To make a good tender of payment of an amount secured by a mortgage, it is necessary for the debtor to allege and show, in addition to the offer, that he has at all times since the tender been ready, able, and willing to pay, and accompany the plea by payment of the money into court. *Dickerson v. Simmons*, 141 N. C., 330, where the tender was made upon the maturity of the debt; and *Smith v. B. and L. Assn.*, 119 N. C., 261, in relation to tender by a surety, cited and distinguished.

APPEAL by defendant from *Ferguson, J.*, at Fall Term, 1910, of HERTFORD.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Allen.*

No counsel for plaintiff.
R. C. Bridger for defendant.

ALLEN, J. This is an action to recover possession of personal property, which the plaintiff claims by reason of a chattel mortgage executed to him by the defendant. The defendant, among other things, alleges in his answer: "That there is still due and owing on the mortgage described in the affidavit for the claim and delivery of personal property in this action, the sum of $6.59, and that said amount was duly tendered to plaintiff by the defendant's attorney on 8 December, 1909, with interest on said mortgage. Said tender is hereby pleaded in bar of further recovery in this action."

It was admitted on the trial that during the month of April, 1909, the defendant executed to the plaintiff a chattel mortgage to secure $100, and conveyed therein a brown mare and the crops raised by the defendant during said year. It was also admitted that during the summer of 1909 the defendant became indebted to plaintiff on account, which was unsecured, in the sum of $29.98, and that there was no agreement, at the time this debt was contracted, that it should be paid out of the proceeds of the property in the mortgage, and the mortgage debt and the open account were not kept upon the books as a running account. The plaintiff admitted, upon his examination as a witness, that about the first of December, 1909, the defendant delivered to him peanuts, a part of the crop of 1909, raised by the defendant, and that he realized therefrom $93.41, which he applied first to the unsecured debt. The defendant introduced evidence that after the mortgage debt became due, he tendered payment of the remainder of said debt, after applying thereto the proceeds derived from the peanuts, and that the plaintiff refused to accept the same. He did not allege nor offer to prove that he had at all times been ready, willing, and able to pay, nor did he pay into court the amount he admitted to be due.

The plaintiff testified that the defendant agreed that the amount received from the sale of the peanuts should be applied first to the unsecured debt. The defendant denied this.

Two exceptions are presented by the record. The first is to the charge of the judge as to the application of the payment of $93.41, which is as follows: "That if plaintiff received the mortgaged property from defendant and sold the same, or retained the said property for his own use, the defendant had a right to direct its application, and if so directed by defendant, plaintiff would have to credit same to the secured debt; but if defendant failed to direct its application, then plaintiff could apply it to either claim as he might see fit; if neither the plaintiff nor defendant applied the payment, then the law would apply it to the most precarious debt—in the case at bar, the unsecured debt"; and the second is to the refusal to give the instruction asked by the defendant, as to the effect of a tender, which is as follows: "That if the jury shall find from the evidence that the defendant was entitled to be credited on the mortgage debt with the peanuts received by plaintiff, and if the jury shall further find from the evidence that the defendant through his attorney tendered balance due on the mortgage debt before the bringing of this suit, that said tender would be a discharge and release of the mortgaged property, and the jury should answer the first issue, $6.59, with interest."

The charge given by his Honor is erroneous. The question is fully discussed and the authorities collated in Cyc., vol. 30, p. 1228 *et seq.*

The general rule as to the application of payments is that the debtor has the right, in the first instance, to direct the application of a payment made to a creditor who holds a secured and an unsecured debt, and that this right must be exercised at the time the payment is made. *Miller v. Womble,* 122 N. C., 139. If the debtor does not exercise this right, the creditor may apply the payment to either debt (*Moss v. Adams,* 39 N. C., 43; *Sprinkle v. Martin,* 72 N. C., 92; *Young v. Alford,* 118 N. C., 220); or he may apply a part to one debt and the remainder to the other (*Young v. Alford, supra*); and he is not restricted to the time the payment is made. If, however, he makes the application, he cannot change it without the consent of the debtor. Cyc., vol. 30, 1239, and note, where many authorities are collected. If neither the debtor nor the creditor makes the application, the law applies it to the unsecured debt. *Miller v. Womble, supra.*

It was this rule which the judge presiding undertook to enforce, but it has no application to the facts in this record. The payment in this case was a part of the proceeds of the property conveyed in the chattel mortgage, and the creditor knew this. The execution of the mortgage was an application of the property to the payment of the debt secured therein, and this could not be changed without the consent of the debtor. *Bonner v. Styron,* 113 N. C., 32. The plaintiff alleged that the defendant gave this consent, and the defendant denied it. This presented a question for the jury, which was withdrawn by the charge of his Honor.

It would not be necessary to consider the request to instruct the jury as to the effect of a tender, if it was not reasonably certain that the same question will be presented on another trial. We think the judge properly refused to give the instruction. The plea of tender is defective in that, in addition to alleging that he tendered the amount due, the defendant fails to allege that he has at all times since the tender been ready, able, and willing to pay, and in failing to accompany the plea by payment of the money into court; and the evidence in support of the plea is equally defective.

In *Dixon v. Clark,* 57 E. C. L. R., 376, *Wilde, C. J.,* announces the rule as follows: "The principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered"; and this is cited with approval in *Bank v. Davidson,* 70 N. C., 122.

In *Bilzell v. Haywood,* 96 U. S. R., 580, it is said that, "To have the effect of stopping interest or costs, a tender must be kept good," and in *Soper v. Jones,* 56 Md., 503: "A plea of tender, not accompanied by *profert in curiam,* is bad."

In the case of *Parker v. Beasley,* 116 N. C., 1, it is held that an unaccepted tender of the amount due on a debt secured by a mortgage does not discharge the lien of the mortgage, unless the tender be kept good and the money be paid into court, and the same doctrine is affirmed in *Dickerson v. Simmons,* 141 N. C., 330.

This last case notes the distinction between a tender made on the day the debt becomes due, called the law day, and one made afterwards, and holds that the first discharges the mortgage, although the plea of tender is not accompanied by payment into court.

The principle is different when the rights of a surety, or of one standing in the relation of a surety, are involved. In such case, a valid tender unaccepted releases the surety and his property conveyed to secure the debt of the principal, and it is not necessary to pay the money into court to make the plea good. *Smith v. B. and L. Assn.,* 119 N. C., 261.

For the reasons given, there must be a *venire de novo.*

New trial.

J. F. BATEMAN v. KRAMER LUMBER COMPANY.

(Filed 1 March, 1911.)

1. **Timber Deeds—Time to Cut and Remove—Determinable Estate.**
   Deeds for standing timber, with their usual provisions, convey to the grantee an estate in fee in the timber, determinable as to all the timber not cut and removed within the stipulated period.
2. **Same—Extension.**
   The provision as to an extension of time in a timber deed, when properly taken advantage of and made available, permits the grantee to cut and remove, for the period of time covered by the extension, the timber therein conveyed.

3. Same—Option—Unilateral Contract—Strict Construction.

A provision in a timber deed granting an extension of time for cutting and removing the timber from the lands described, upon condition of a certain payment to be made by the grantee, is unilateral in its obligations, partaking, to some extent, of the nature of an option, in which time is ordinarily of the essence, and should be strictly construed.

4. Same—Notice—Tender.

A deed to standing timber stated that the grantees "shall have a term of two years in which to cut and remove said timber, and in the event they do not get it off in that time they shall have one year thereafter in which to remove the same by paying to the party of the first part interest on the purchase money for said extension of time." Subsequently, the plaintiff purchased the land whereon the timber was situated, and had his deed duly registered six months before the expiration of the two-year period set out in the timber deed. There being no evidence that the defendant notified the owner of the land that he would avail himself of the provision for the further extension of one year, or that he tendered the payment of the interest required for the exercise of that privilege: *Held*, he had lost the right to avail himself thereof, and his cutting and removing the timber specified in the deed after the two years had elapsed was unlawful.

5. Appeal and Error—Instructions—Entire Record—New Trial—Procedure.

When the charge of the trial court is erroneous in respect to that part excepted to by the defendant, and the entire evidence relative to the inquiry is before the court, from which it is perfectly apparent that in no aspect of it is there any defense available, a new trial will not be granted.

APPEAL from *J. S. Adams, J.*, at November Term, 1910, of TYRRELL.

Civil action to recover damages for wrongfully cutting timber on lands of plaintiff. There was evidence to show that on 1 October, 1906, Enoch Bateman sold and conveyed to defendant company the standing timber on a certain tract of land in Tyrrell County, the deed therefor containing the following stipulation concerning the cutting and removing of the timber: "It is expressly understood and agreed that the party of the second part, its successors and assigns, shall have a term of two years in which to cut and remove said timber, and in the event they do not get it off in that time they shall have one year's time thereafter in which to remove the same by paying to the party of the first part interest on the purchase money for said extension of time. It is further understood and agreed that the party of the second part, its successors and assigns, shall have, with their servants, agents, and employees, teams, carts, and other appliances, right of ingress, egress, regress to, in, and across said land, for the purpose of cutting and removing said timber or other timber which they may own upon other and contiguous or adjoining tracts. And shall also have the right to build upon said land any or all necessary buildings, stables, camps, or other shelters for the purpose of properly prosecuting the work of cutting and removing the timber above referred to, or which may be convenient or necessary for said work. To have and to hold all of the above-described timber rights and privileges to the said party of the second part, its assigns, for and during the time specified, or extension thereof, as above specified." That on 9 March, 1908, six months or more before the two years had expired, Enoch Bateman conveyed the tract of land, with all the rights and privileges thereon, to plaintiff, J. F. Bateman. That a few trees were cut a short time before the expiration of the two-year period, but the great bulk of the timber was cut and removed after the two years had expired, plaintiff testifying that all cutting after the two years had been done after notice and protest on his part. Among other things, the court charged the jury: "That the extension clause of the contract in this case gave in any event only the right to remove after the two years expired what had been cut during the two years. It could give no right to cut after the two years had expired." There was verdict awarding damages for timber cut after period of two years. Judgment on the verdict, and defendant excepted and appealed.

M. Majette and W. M. Bond for plaintiff.
E. F. Aydlett and J. C. B. Ehringhaus for defendant.

HOKE, J., after stating the case: We have held in many recent decisions that deeds of this character by correct interpretation convey to the grantees an estate in fee in the timber, determinable as to all of the timber not cut and removed within the stipulated period. *Hornthal v. Howcott, ante,* 228; *Midyette v. Grubbs,* 145 N. C., 85; *Mining Co. v. Cotton Mills,* 143 N. C., 308; *Lumber Co. v. Corey,* 140 N. C., 467; *Hawkins v. Lumber Co.,* 139 N. C., 162. It has been held further, that in conveyances and contracts of this kind, considering the general purport of the instrument, the character and extent of the property, and the time allowed and required for the purpose, the provision as to the extension of time, when properly taken advantage of and made available, permits the grantees to both cut and remove, for the period covered by the extension, this being the clear intent of the parties. *Lumber Co. v. Smith,* 150 N. C., 253. There was error, therefore, in the ruling of the court below, "that the extension claim of this contract gave only the right to remove, but not to cut, after the two years had expired." We are of opinion, however, that the results of the trial should not be disturbed on this account, for the reason that in no aspect of the evidence has the defendant shown any right to avail itself of the stipulation as to the extension of time, and therefore any and all cutting and appropriation of timber, after the two years specified, constituted a wrongful invasion of plaintiff's rights. The provision in question, conferring as it does a privilege, and unilateral in its obligation, partakes to some extent of the nature of an option, in which time is ordinarily of the essence, and the accepted doctrine in reference to this and other instruments containing the same and similar language is that they should be strictly construed. *Product Co. v. Dunn,* 142 N. C., 471; *Alston v. Connell,* 140 N. C., 485; *Estes v. Furlong,* 59 Ill., 298; *Dyer v. Duffy,* 39 W. Va., 148; *Mason v. Payne,* 47 Mo., 517; 21 A. and E. (2d Ed.), 931. In this last citation it is said: "There is, moreover, a strong inclination on the part of the courts to view any delay with great strictness, on the ground that the party seeking to enforce performance was not bound, while the other party was bound." In the case of *Estes v. Furlong, supra,* the Court recognizes the general proposition that "when a contract is in anywise unilateral, the Court will regard any delay on the part of the purchaser with especial strictness," etc. Applying the principle, we are of opinion, and so hold, that the stipulation in this instrument, "That the parties shall have two years in which to cut and remove the timber, and in the event they do not get it all off in that time, they shall have one year's time thereafter in which to remove the same, by paying to the party of the first part interest on the purchase money for said extension of time," by correct interpretation requires that on or before the expiration of the specified period of two years the grantees claiming the privilege should notify the owner of the property and tender the stipulated amount. We have held in a case at the present term, *Hornthal v. Howcott, supra,* that when the estate in the timber determines, certainly in the absence of clear and express provision to the contrary, it does so in favor of the owner of the land, *Associate Justice Allen* succinctly stating the principle as follows: "The defendants in this case are grantees of the premises, under a deed from plaintiffs, and we conclude that the legal effect of that deed is to convey to the defendants the land and all the timber thereon not cut and removed by the Roper Lumber Company within four years from the date of the deed." In the present case there is no evidence which shows or tends to show that any tender of this interest was ever made to plaintiff, who was owner of the land when the period of two years expired, and had been for more than six months. There is no evidence which shows or tends to show that any tender was ever made to Enoch Bateman, plaintiff's grantor, prior to the execution of the deed to plaintiff or prior to its due and proper registration in August, 1908. We incline to the opinion that there is no testimony, deserving of serious consideration, that any tender of this interest was ever made to Enoch Bateman, himself, until some time after the two years had expired, and such a tender, by authority, would be too late even if Enoch Bateman had been the proper person. *Product Co. v. Dunn, supra.* True, Mr. C. E. Kramer, an officer of defendant company, when he first testified to this point, stated that he had authorized such a tender through D. P. White, a foreman, a few days prior to 1 October, 1898, the date when the specified time expired, but when shown the check which, it was claimed, constituted the tender, he very properly requested to be allowed to take the stand again to say that he was mistaken about the time of the tender, and that it was on 15 October, two weeks after the time had expired. It appears, also, that a witness by the name of R. A. Jennings had testified that the check had been offered on 18 September, but in the light of the date of the check and the admissions of C. E. Kramer as to the date, it is evident that this witness too was mistaken; but, without deciding whether there was any testimony of a tender to any one, prior to 1 October, there is, as stated, no claim or evidence tending to show that any tender was ever made to J. F. Bateman, plaintiff and then owner of the property. The entire testimony relevant to the inquiry was before the court, and while there was error in the charge, as stated, it being perfectly apparent that in no aspect of it is there any defense available, our decisions are to the effect that in such case a new trial should not be granted. *Cherry v. Canal Co.*, 140 N. C., 422, 426. In that case the Court quotes, with approval, from 2 A. and E. Pl. and Pr., p. 500, as follows: "This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal, or other objections which the record shows could not have prejudiced appellant's rights," and citing *Butts v. Screws,* 95 N. C., 215; *Ratliff v. Huntly,* 27 N. C., 545; *Fry v. Bank,* 75 Ala., 473, in support of the principle as stated. We find no reversible error in the record, and the judgment of the court below is affirmed.

No error.

WALKER, J., concurs in result.

SMITH HARVELL v. THE WELDON LUMBER COMPANY.

(Filed 1 March, 1911.)

1. **Negligence—Assumption of Risks—Issues—Instructions—Procedure.**

   In order for a defendant to make the defense of assumption of risk available to him on the trial, it is necessary for him to tender an issue or ask for an instruction thereon. In this case he has received the benefit of the plea under the issue of contributory negligence.

2. **Master and Servant—Negligence—Pleadings—Defective Statement—Answer—Aider.**

   In an action for damages by a servant for personal injuries alleged to have been caused by the master's negligence, it was alleged in the complaint that the defendant "allowed its passway to become and remain in an unsafe and dangerous condition where the plaintiff and other employees had to pass and repass in the performance of their duties," and that the injury was caused thereby: *Held*, the plea is defective in not stating wherein the passway and platform had become unsafe and dangerous, but it is a defective statement of a cause of action which was aided by answer.

3. **Master and Servant—Safe Place to Work—Negligence—Evidence.**

   A servant having brought his action against his master for damages arising from the latter's alleged negligence in permitting a hole to remain in a passway on a platform where the former was required to work, the defendant's testimony that the hole had been repaired by placing boards over it, and that the injury complained of was caused by plaintiff's stumbling and breaking a board, and that there were thicker boards at defendant's plant, and the one used was not thick enough, is some evidence that the passway was unsafe after the repairs were made.

4. **Negligence—Proximate Cause—Burden of Proof.**

   In an action for damages for an alleged negligent act, it is not sufficient that the plaintiff proves a negligent act of the defendant with reference to the injury; he must further show that the negligence complained of was the proximate cause.

5. **Negligence—Proximate Cause—Continuing Negligence—Definition.**

   Proximate cause is the dominant efficient cause, without which the injury would not have occurred; and if the negligence of the defendant continues up to the time of the injury, and the injury would not have occurred but for such negligence, it is not made remote because some act, not within the control of the defendant, and not amounting to contributory negligence on the part of the plaintiff, concurs in causing the injury.

6. **Same—Concurring Negligence.**

The fact that the servant stumbled and fell into a hole in a passway where he was required to go in doing his work, and which had been negligently permitted to remain there by the master after notice thereof, does not, in itself, amount to contributory negligence which will bar the recovery of damages by the servant in his action against the master for an injury received in consequence of the master's negligent act. If, however, a negligent act of the servant caused him to stumble and fall into the hole, his negligence would concur with that of the master, and the latter's negligence would not, in a legal sense, be the proximate cause.

7. **Negligence—Evidence—Inference—Questions for Jury.**

An issue of negligence must be submitted to the jury, and a nonsuit upon plaintiff's evidence should not be granted, when therefrom two minds could reasonably draw different conclusions, one of which would be favorable to the plaintiff.

8. **Same—Master and Servant—Obvious Danger—Rule of the Prudent Man.**

With respect to his own safety in doing work where it is necessary for him to go on the master's premises, it is the duty of the servant to observe, and he is chargeable with those conditions he could discover by the exercise of ordinary care; but he is not guilty of contributory negligence because he works in the presence of danger, unless it is so obvious that a man of ordinary prudence would have refused to do so.

9. **Same—Evidence—Nonsuit—Questions for Jury.**

In an action for damages by the servant against the master for the latter's alleged negligence in permitting a hole to remain in a passway over a platform at his lumber plant where the plaintiff was required to go in the discharge of his duties, there was evidence on behalf of plantiff tending to show: that he had some time before informed the defendant of the defect, and it had promised to remedy it; that plaintiff in discharge of his duties was going along the passway with an empty truck, weighing 115 pounds, on his shoulder, groping his way with his right hand along defendant's kiln in the smoke from defendant's kilns, which rendered him unable to see the hole, though he knew it was there; that he would have had to wait about fifteen minutes before the smoke would have cleared away, but had he waited he would have been discharged: *Held*, it was a question for the jury as to whether the plaintiff acted as a man of ordinary prudence, and a motion by defendant to nonsuit upon the evidence was properly denied.

10. **Negligence—Evidence—Harmless Error.**

As tending to show notice to the master of a negligent defect at a place where the servant was required to go in the discharge of his duties, the plaintiff testified that he told the defendant's foreman thereof, and that the defendant's president said for the foreman to have it fixed; that in reply the foreman bowed his head: *Held*, it was not reversible error for the plaintiff to testify what he understood by the act of the foreman in bowing his head—that it made him think the hole would be fixed—it being germane to the question of plaintiff's contributory negligence in continuing to work in the presence of a known danger; or harmless error at least, the act necessarily indicating an assent.

APPEAL by defendant from *Ferguson, J.*, at August Term, 1910, of NORTHAMPTON.

The plaintiff, an employee, was injured on a platform of the defendant, on 22 April, 1909, while at his work. He alleges in his complaint:

"5. That for about four months prior to said 22 April, 1909, there had been a hole in the floor of said platform about 10 inches wide and 4 feet long and located in the passway between said tracks running to kilns Nos. 2 and 3, which said hole was caused by the breaking of a plank which formed a part of the floor of said platform.

"7. That on or about 22 April, 1909, it became necessary for the plaintiff, while in the performance of his duty, to pass along said passway between the tracks leading to kilns Nos. 2 and 3, with an empty truck on his shoulder, and when he got near the hole in said passway he stumbled and fell through said hole in said passway with said empty truck, weighing about 100 pounds or more, on his shoulder, a distance of several feet and landing on a brace or rafter or stob of some kind, which was under said platform, and struck plaintiff in the groins and the small of plaintiff's back fell across an empty truck which was lying on top of said platform, and the truck on plaintiff's shoulder fell over and hit him in the stomach or bowels, by which plaintiff was so badly and permanently injured that he was confined to his bed for about three weeks and confined to his house for about four weeks, was unconscious for several hours, suffered great and excruciating pain and mental anguish, has been spitting up blood off and on ever since said injury and has been compelled to use crutches off and on ever since said injury, and is still crippled, and, as he is informed and believes, permanently injured.

"8. That plaintiff's said injury was caused by the negligence of the defendant company, which said negligence consisted (1) in their failure to repair the hole in said passway after having been notified and requested by the plaintiff and other employees of said company to do so, and (2) in said company's allowing its said passway and platform to become and remain in an unsafe and dangerous condition when the plaintiff and other employees of said company had to pass and repass in the performance of their duties."

The defendant answered said paragraphs as follows:

"5. In answer to section 5, it is admitted that some time prior to 22 April, 1909, there had been a hole in the floor of said platform, but it is denied that it was of the dimensions alleged in the complaint. And further answering said section, this defendant says that the location of said hole was perfectly apparent to the plaintiff, and prior to the alleged accident the same had been covered and closed by another board reasonably sound and strong, and the same was so covered at the time of the alleged accident.

"7. Section 7 is not true, and the same is denied as therein alleged, except that it is admitted that the plaintiff, in the performance of his duty, had to pass along said passway with an empty truck on his shoulder.

"8. Section 8 of the complaint is not true, and the same is denied."

The plaintiff testified: "I am plaintiff. On and before 22 April, 1909, was working for Weldon Lumber Company. Began to work for them September, 1908. There was a hole between Nos. 2 and 3 kilns in walkway. At time I got hurt

No. 2 was filled; No. 1 filled. No. . . was blocked, and they were pulling lumber out on opposite side. I was to put more lumber in kiln. The smoke in all the kilns had got in and hid the hole. I was walking with right hand on kiln No. 1. I was feeling to try to keep from falling in the hole. I knew it was there, but could not see it. The smoke from the kilns was such that I could not see. Shed was covered over. When you pull a kiln, you open door, and had to open all the kilns to fill No. 3. At No. 3, it being pulled, I could not see it. When I started in I could see the hole from the outside, and thought I could see the hole, but when I got in I couldn't. The hole was there in September; was my duty to walk along passway that way. I would go by hole some fifteen or twenty times a day, and three others besides myself. I had to carry boards from green end. It was my duty to take trucks where dry lumber was unloaded and carry it back to the kiln. Mr. Pilley hired me to work. I told Mr. Pilley about the hole twice. I know Mr. Pilley passed along the hole sometimes two or three times a day. I told him about the hole the second week I worked. Mr. Shepard was going by there. I told him that the hole needed to be fixed. Mr. Shepard is president of the company. He said to tell Mr. Pilley about the holes. I told him that Mr. Shepard told me to go to Mr. Pilley to have the holes fixed. I told Mr. Pilley what Mr. Shepard said. He bowed his head to me. I went back to work. . . . It was about three weeks from that time I fell in the hole and was hurt. End of truck hit me in the stomach. I had truck on left shoulder feeling my way down to No. 3 by side of another truck. By kilns being just pulled, smoke had not got out. I could not see the hole, and slipped in it. . . . Hole large enough to fall in; about as wide as step (pointing to step of judge's platform) which is about 12 inches wide; was about 5 feet long. Truck on my shoulder weighed about 100 pounds. It was my business to carry truck on my shoulder. . . . This hole was between Nos. 2 and 3. It was in daytime. Passageway was as wide as step of judge's stand from witness's platform, which is about three feet. If I said in my complaint about 10 inches wide and and 4 feet long, I don't remember. I told Mr. Pilley about mending hole in September; spoke of hole once or twice. What kept me from mending hole was that I was hired to move lumber. I had no saw or hammer. They had a carpenter. If I had laid a plank they could not have moved the trucks. I never broke through before. I don't remember stumbling. I stated in complaint that I stumbled and fell in the hole; stepped on a stick at the edge of hole. It was that that caused me to fall in the hole. I could not see the stick or the hole. I reckon I would have stepped in the hole, as I could not see. It was steam from kiln that so filled the passageway. It takes some fifteen minutes for steam to shift and pass away when kilns are shut up. If I had waited till steam had cleared away I could have seen the hole. The men who carry trucks carry sticks. I might or I might not have put the stick in there; both of my legs in hole. I don't know how I got in the hole, but I got both legs in hole. The truck I fell on was on the platform. . . . I had frequently walked by when the hole was hid by steam without getting in it; have walked by there since I went there in September. . . . If I would have stood doing nothing, waiting for steam to clear, I would have been discharged. It was my duty to put truck in as soon as possible. I opened the doors. It was my duty."

The evidence as to the extent of the injuries is omitted, as there is no exception bearing on the issue of damages. The defendant introduced evidence tending to show that, at the time of the injury, the platform or passway was in good condition; that there had been a hole in it, but it had been repaired before the plaintiff was injured; that the board of the passway was broken by the plaintiff throwing down the end of the truck which he carried on his shoulder. The board was shown to the jury, and a witness for defendant testified: "There were thicker boards at the mill. Board is not strong enough to hold the weight."

Peebles & Harris and Gay & Midyette for plaintiff.

Walter E. Daniel, E. L. Travis, and Mason & Worrell for defendant.

ALLEN, J., after stating the case: The defendant relies principally on a motion to nonsuit the plaintiff, but also contends that his Honor did not instruct the jury as to the assumption of risk, which is relied on as a defense, and that he erroneously submitted to them the question of the liability of the defendant, because of failure to properly repair the passway, insisting that the only negligence alleged in the complaint is that alleged in paragraph 7.

The doctrine of assumption of risk does not arise, as the defendant did not tender an issue or ask for an instruction thereon. We do not think, however, that the defendant has suffered any injury by its failure to do so, as it received full benefit of the facts relied on under the issue of contributory negligence.

The defendant's construction of the complaint would be correct if the plaintiff was confined to the facts alleged in paragraph 7, but the plaintiff goes further and alleges, in paragraph 8, that the defendant allowed its passway and platform to become and remain in an unsafe and dangerous condition where the plaintiff and other employees had to pass and repass in the performance of their duties. This plea is defective, and the defendant had the right to require the plaintiff to state wherein the passway and platform had become unsafe and dangerous, but it is a defective statement of a cause of action which is aided by answer. *Whitley v. R. R.,* 119 N. C., 727; *Bennett v. Tel. Co.,* 128 N. C., 103.

Justice Walker says in *Hitch v. Comrs.,* 132 N. C., 575: "It is well settled that in a case where the pleading is not framed with technical accuracy, or something is lacking to constitute a good statement of a cause of action, the defect is waived by pleading to the merits or by not taking advantage of the defect in some proper way, and the defective pleading is aided and the necessary averments will be supplied by the law." There is no injustice in the application of this rule in this case, as the record discloses that both parties had full opportunity to present evidence as to the condition of the walkway. The counsel for defendant doubtless failed to point out the defect in the Superior Court because they knew it would be cured by amendment.

If the hole in the passway had been repaired by placing boards over it, and the plaintiff stumbled and broke a board, the fact that the board broke and the evidence of the defendant's witness that there were thicker boards at the mill and that the broken board was not strong enough to hold the weight, was some evidence that the passway was unsafe after the repairs were made.

This brings us to the consideration of the motion to nonsuit, which is on two grounds:

1. That if the defendant was negligent, the act of the plaintiff in stumbling and falling was the proximate cause of the injury, and not the negligence of the defendant.

It is well settled, as contended by counsel for defendant, that a plaintiff cannot maintain an action by showing that the defendant is negligent, and that he must go further, and show that this negligence was the proximate cause of his injury; but by proximate cause is not necessarily meant the cause nearest the injury. It may be true that the plaintiff would not have been injured if he had not stumbled, and equally true that, although he stumbled, he would not have been injured if the passway had not been unsafe. Proximate cause means the dominant efficient cause, the cause without which the injury would not have occurred; and if the negligence of the defendant continues up to the time of the injury, and the injury would not have occurred but for such negligence, it is not made remote because some act, not within the control of the defendant, and not amounting to contributory negligence on the part of the plaintiff, concurs in causing the injury. The rule is thus stated in Cyc., vol. 26, 1092: "Where the master's negligence is the efficient cause of the injury, he is liable, although his negligence is combined with some ulterior cause." *Malott v. Hood,* 99 Ill. App., 360; *New York R. R. v. Green,* 70 Tex., 257; *Texas R. R. Co. v. McLane,* 24 Tex. Civ. App., 321.

In *Ætna Ins. Co. v. Boon,* 95 U. S., 117, *Justice Strong* says: "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time and place. The inquiry must always be whether there was any intermediate cause *disconnected from the primary fault* and self-operating, which produced the injury."

In *Harton v. Telephone Co.,* 141 N. C., 455, the question is fully discussed, and *Justice Hoke,* speaking for the Court, quotes with approval the following statement of the law: "To show that other causes concurred in producing or contributing to the result complained of is no defense to an action of negligence. There is, indeed, no rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of the plaintiff's injuries. When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable."

It is true that two justices dissented, but the difference of opinion was not as to the doctrine, but to the application of it in that case.

It follows, therefore, that the act of stumbling and falling into the hole alone will not prevent a recovery.

If, however, the plaintiff was negligent, and this negligence caused him to stumble and fall, he could not recover, although the defendant was also negligent, because this would present a case of concurrent negligence, and it is well settled that when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is not in the legal sense proximate. The defendant says that this condition is presented by the evidence of the plaintiff, and upon this bases its second ground for judgment of nonsuit.

Is the plaintiff guilty of contributory negligence on his own evidence? If two minds could reasonably draw different conclusions from his evidence, one of which would be favorable to the plaintiff, the judge could not so declare, but must leave the matter to the determination of the jury. *Grand Trunk R. R. v. Ives,* 144 U. S., 408; *Norton v. R. R.,* 122 N. C., 929.

In *Russell v. Town of Monroe,* 116 N. C., 729, the Court says: "It will be found that the question whether a plaintiff has contributed by his own carelessness to bring about an injury complained of, must be answered after a comprehensive consideration of the conditions confronting him at the time."

Accepting the evidence of the plaintiff to be true, for the purposes of this motion, he knew of the defect in the passway, and under the conditions surrounding him ought to have known it was dangerous to go along that way; he had informed the defendant of the defect and the defendant had promised to remedy it; he was carrying an unloaded truck on his shoulder, weight 115 pounds; the defect could not be seen by him on account of the smoke from the kilns; he stumbled and fell; he was in the performance of his duty and was walking with his right hand on kiln No. 1 and was feeling to keep from falling; it would have taken fifteen minutes for the smoke to clear, and if he had stood doing nothing, waiting for the smoke to clear, he would have been discharged. We think under these circumstances it was for the jury to say whether he acted as a man of ordinary prudence, and this his Honor submitted to them.

"It is not contributory negligence for a servant to undertake dangerous work, where it is required by the nature of his employment, unless the danger is so obvious and imminent that no ordinarily prudent person would consent to undertake it." Cyc., vol. 26, 1256.

It is the duty of the employee to observe, and he is chargeable with those conditions he could discover by the exercise of ordinary care; but he is not guilty of contributory negligence because he works in the presence of a danger, unless it is so obvious that a man of ordinary prudence would have refused to do so. *Midgette v. Mfg. Co.,* 150 N. C., 347; *Bissell v. Lumber Co.,* 152 N. C., 124.

In Cyc., vol. 29, 140, a great many authorities are collected in support of the proposition that, "The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence, as matter of law, but the question should be submitted to the jury."

The case of *Beard v. R. R.,* 143 N. C., 142, is very much like the one under consideration, except we think the evidence of contributory negligence was stronger in that case than in this. The plaintiff Beard was a freight conductor, and on the night he was injured, which was dark and stormy, he was ordered to take out a freight train. He went to the freight office for his waybills, and as he came out and reached the platform, the wind blew out his lantern. There were no lights on the platform, and from the platform to the railroad track there were steps, which were cut into the platform about three feet and had no railing around them. He knew the steps were there and did not return to the office to light the lantern, but continued along the platform, feeling his way with his feet, and fell down the steps and was injured. It was held that he was not guilty of contributory negligence on his own evidence, and *Justice Connor,* speaking for the Court, says:

"The principles of law governing the case are well settled. If it can be said that the plaintiff's duty to return to the office and light his lantern was so manifest and his failure to do so clearly negligent, so that two reasonable minds could come to but one conclusion in regard thereto, the authorities sustain defendant's contention. On the other hand, if, measured by the standard of conduct which would control the reasonably prudent man, under similar circumstances, his conduct is capable of more than one reasonable inference, the decision of the question was properly left to the jury. Plaintiff was not injured by reason of falling into a hole, the existence of which was unknown to him. There was no negligence in the position or construction of the steps, but it was the duty of defendant to have and maintain sufficient light along the platform and near the steps or to have a railing so that their employees could use them with reasonable safety. This was a positive duty, the failure to perform which makes the defendant liable, unless the danger in using them was so manifest and obvious that no prudent man would do so in the absence of lights. In passing upon this question his Honor was compelled to take into consideration the whole evidence and fix the standard of duty, applying the legal test of prudence. It cannot, we think, be said that, using his senses, members, and knowledge of surrounding conditions, as described by plaintiff, he was manifestly regardless of his safety. Common observation teaches us that many persons clearly within the pale of ordinary prudence, feel their way along steps in the dark. We can hardly think that by doing so they can be said to be clearly and obviously negligent."

We have examined the exceptions to the charge of his Honor and to the refusal to give certain instructions requested by the defendant, and find no error. The prayers of the defendant were directed almost entirely to the questions of proximate cause and contributory negligence, which have been considered.

There is one exception to evidence. The plaintiff testified that he went to Mr. Pilley, a foreman of the defendant, and told him about the hole, and that Mr. Shepard, president of the defendant, said to have it fixed, and that Mr. Pilley bowed his head. He was then asked: "What effect did Mr. Pilley's nodding his head, when you told him, have on you?" To which defendant excepted. He replied: "It made me think he was going to have it fixed."

We think it was competent for the plaintiff to state what the foreman did and the impression made on him, as the defendant was contending that he was guilty of contributory negligence in continuing at work in the presence of a known danger; and bowing the head under the circumstances detailed by the witness reasonably indicated assent.

Upon consideration of the whole case, we find

No error.

STATE EX REL. J. H. KERR, SOLICITOR, ET AL., V. ISAAC HICKS ET AL.

(Filed 1 March, 1911.)

1. **Associations—Churches—Powers—Agreement—Custom.**

   A voluntary association of churches has no existence or powers except those contained in its formal articles of agreement or established by custom acquiesced in by the parties to it; and when, as here, it consists of an annual meeting of delegates from its constituent members, the churches, to further certain common interests, the organization is dissolved upon adjournment into its individual elements until reassembled pursuant to the common agreement.

2. **Same—School Trustees—Appointment—Regular and Called Meetings.**

A voluntary association of churches chartered and established a school, naming, as authorized, trustees for the school. The constitution of the association provided that it "may be altered or amended at any regular meeting . . . by a two-thirds vote of the members present." At a regular annual meeting the church of "Blessed Hope" was designated as the place for the next annual meeting. Subsequently, the officers of the association met and decided to "withdraw fellowship" from "Blessed Hope," rescinded the resolution to meet there and designated a different church in another locality for that purpose, where a majority of the churches were represented by delegates. Delegates from the majority and minority number of the churches met at each of the respective places on the day appointed, and at each meeting trustees for the school were elected: *Held,* (1) that the meeting at "Blessed Hope" was the legal one, and the trustees appointed by a majority vote of the delegates there present were those legally entitled to administer the affairs of the school. *Simmons v. Allison,* 118 N. C., 774, cited and distinguished.

3. **Associations—Churches—Powers—Trustees—Appointment—Parties—Court's Discretion.**

At a meeting regularly held by a voluntary association of churches, trustees were appointed for a school chartered by the association. At the same time, but at a different place, there was a meeting called by the officers of the association, when and where other and conflicting trustees were appointed. The question at issue being which set of trustees were the ones legally qualified to act, it was *Held,* (1) that the trustees appointed at these meetings were the real parties in interest, and it was not error for the trial judge in his discretion to order them to be made parties, so that the matter might be decided upon its merits (Revisal, 507); (2) no appeal lies from the refusal of a motion to dismiss, and an entry of appeal not perfected is treated as an exception on appeal from the final judgment.

4. **Same—Exceptions—Appeal and Error—Procedure.**

The amendment making additional parties does not affect the decision in this case, as thereby the subject of the controversy was not changed, the additional parties being the beneficiaries for whom this action was brought, and proper parties (Revisal, 400); and if it be conceded that the solicitor was an unnecessary party, that is not ground for an exception.

APPEAL by defendants from *Ward, J.,* at June Term, 1910, of WARREN.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

T. M. Pittman, Tasker Polk, and A. J. Harris for plaintiff.
T. T. Hicks for defendant.

CLARK, C. J. In 1871 a voluntary association, known as "Shiloh Association," was formed by several Missionary Baptist churches for colored people. In 1883 the association purchased land for $2,500 and established a school called Shiloh Institute. Said school was chartered, Pr. Laws 1891, ch. 321, the aforesaid association procuring the charter and naming the trustees. The charter was amended, Pr. Laws 1903, ch. 49. In August, 1907, the association was composed of 58 churches. At the annual meeting held at that time, the church of "Blessed Hope" at Henderson was named as the place for the next meeting of the association. But, subsequently, the officers of the association called an extra session to be held at Manson, 27 December, 1907. The churches were notified and 44 of them sent delegates. At that meeting it was decided to withdraw fellowship from "Blessed Hope" Church, and the resolution to hold the next annual session at that church was rescinded, and it was decided to hold it at Ridgeway. The plaintiffs claim that they were duly elected trustees of the school by the representatives of 10 or 12 churches who assembled at "Blessed Hope" in 1908, in accordance with the resolution passed at the regular annual meeting of 1907, and at subsequent meetings, in pursuance of its action, and that the called meeting at Manson in December, 1907, was without authority and void.

The judge below held that there was no provision in the by-laws or constitution of the association for calling the extra session at Manson in December, 1907, and that the proceedings at said meeting were irregular and void, as were all the subsequent meetings held in pursuance thereof, and the election of trustees at such meetings; and that the annual meeting held at "Blessed Hope" in 1908 was the regular meeting of the association, and that the trustees chosen thereat and at the subsequent meetings held in pursuance of the resolutions adopted thereat are the legally chosen trustees.

The question presented, then, is whether the action of a minority of the churches who met at the regular time and place, or that of the seceding majority held at an irregular time and place is valid. The constitution of the association provides: "Article 11. This constitution may be altered or amended at any regular meeting of the association by a two-thirds vote of *the members present.*" There is no provision which required a majority to constitute a quorum, nor which authorized the calling, by certain officers, of the meeting at Manson in December, 1907. The association is not incorporated, and the constitution, which is the contract between the parties, contemplates that a majority of the members present at any regular meeting should be the association.

A corporation has only such powers as are conferred by the charter creating or the laws regulating it, and a voluntary association has no existence or power except as contained in its formal articles of agreement or established by custom, acquiesced in by the parties to it. When the association consists, as here, of the annual meeting of delegates from its constituent members—the churches—to further certain common interests, the organization is dissolved, upon adjournment, into its individual elements until reassembled pursuant to the common agreement.

"In church organizations, those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation." *Roshi's Appeal,* 69 Pa., 462; 8 Am. Rep., 280; *Gable v. Miller,* 10 Paige, 627. This was recently held by the House of Lords in England as to the State Church of Scotland (L. R. App. Cases, 1904), where a very small per cent of the "regulars" were adjudged entitled to hold the entire property of the organization. The courts will not decide such controversies beyond ascertaining which is the "regular" organization.

We concur, therefore, with his Honor, that the regular meeting held in 1908 at "Blessed Hope" in pursuance of the resolution adopted at the regular annual meeting in 1907 constituted the legal association, though the representatives of only a minority of the original 58 churches attended, and that the action of the seceding majority held at Manson in December, 1907, had no legal force or effect. There has been a regular succession of meetings and the election of trustees of Shiloh Institute thereat in pursuance of the action taken at "Blessed Hope," the regular meeting, in 1908, and his Honor properly held that the plaintiffs, being such trustees, are entitled to administer the school known as Shiloh Institute.

This action was originally instituted by the State on relation of the solicitor, under Revisal, 3922-4. The amendment to the charter in 1903 provided that the trustees of Shiloh Institute should be elected by Shiloh Baptist Association, two at each annual meeting of the association. The defendants in the action were the trustees elected at the Manson meeting and at the other meetings held in pursuance thereof. It appearing that the real parties in interest were the trustees which had been elected at the regular meeting held at "Blessed Hope" in 1908, and at the successive meetings held in pursuance thereof, his Honor properly granted their application to be made parties plaintiff, so that the whole matter might be decided upon its merits, and refused to dismiss the action. It could have been no advantage to either plaintiffs or defendants to have dismissed the action that was then pending, which was brought to decide who were entitled to administer the trust, and the court in its discretion admitted the real parties in interest to be joined. Revisal, 507.

No appeal lay from the refusal to dismiss (*Johnson v. Reformers,* 135 N. C., 385), and the entry of appeal, though not perfected, will be treated as an exception on this appeal from the final judgment. *Bernard v. Shemwell,* 139 N. C., 446.

The defendants were already in court, the subject of the controversy was not changed by the amendment, and the additional parties, being the beneficiaries for whom the action was brought, were properly made parties. Revisal, 400. Even if it be conceded that the solicitor was an unnecessary party, this is not ground for exception.

The object of The Code system is to decide cases upon the merits. Here the cause of action from the beginning was to determine which set of trustees should administer Shiloh Institute. The defendants were regularly made parties and had full opportunity to present their side of the question. If there was a defect of parties plaintiff originally, it was cured by the amendment which allowed the beneficiaries of the action, the other set of trustees, to be made parties plaintiff.

This case differs from *Simmons v. Allison,* 118 N. C., 774, where the congregation was permitted to vote as to its choice. There the congregation was the constituent body. Here, by the constitution, the contract of the association, a "majority of the members present" at a regular meeting was the organic body and had the right to elect the trustees.

No error.

W. L. PATRICK v. A. A. SPRINGS.

(Filed 1 March, 1911.)

1. **Public Inns—Hotels—Guests—Invitation—Negligence.**
A hotel keeper, from the nature of his occupation, extends an invitation to all who come on his premises; and though not an insurer of the guest's personal safety, he is responsible in damages for injuries received by the guest from being placed in an unsafe or unsanitary room.

2. **Same—Contributory Negligence—Evidence—Questions for Jury.**
In this case there was evidence tending to show that the plaintiff, a guest at defendant's hotel, was shown into a bedroom wherein there was a defective gas fixture by which a light was furnished to the occupant, by reason of not having a safety-pin to prevent the turning of the key all the way around, and that the gas fixture was not safe in consequence; that before retiring for the night the plaintiff discovered the absence of this safety-pin, but turned the key to where it should have stopped, and could smell no gas escaping, and thereupon he retired, but was injured by asphyxiation that night when asleep: *Held,* a motion to nonsuit was properly denied, there being evidence of

defendant's negligence; and it was for the jury to say whether, according to the rule of the prudent man, the plaintiff was guilty of such contributory negligence as would bar his recovery.

APPEAL from *Ward, J.*, at July Special Term, 1910, of HYDE.

The action was brought to recover damages of defendant Springs, the keeper of a hotel in Washington, N. C., for damages suffered by plaintiff by reason of having been assigned to an unsanitary room in which was an unsafe and leaky gas fixture.

The usual issues were submitted of negligence, contributory negligence, and damage. The jury answered first issue "Yes," the second "No," and assessed plaintiff's damage at $250. The court rendered judgment for plaintiff, and defendant appealed.

W. M. Bond for plaintiff.
Small, McLean & McMullan for defendant.

BROWN, J. The record discloses that this action was brought by the plaintiff to recover damages suffered by reason of being asphyxiated while plaintiff was a guest in defendant's hotel in Washington, N. C. The testimony shows that plaintiff and companion were assigned by defendant's clerk to a room in defendant's hotel. The evidence of plaintiff tends to prove that he resided in Hyde County and was visiting Washington and stopped at defendant's hotel with his companion, one Mann. They were assigned to a room and went to bed about 11 o'clock at night. The hotel was lighted by gas, and the plaintiff's room had a gas burner with no stop or safety-pin in it, so that the key was loose and could be turned all way around. Defendant's witness, Martin, testifies he examined fixture next morning, having been called in to fix it. He says the safety-pin was out, and that with the pin out it would not be safe.

Plaintiff testifies that he turned out gas carefully and discovered that there was no stop-pin, and that he turned the key at place where it should stop and that he could smell no gas. Then he went to bed. During night he woke up and found Mann crawling over him. The room was full of gas. He says he was asphyxiated, but managed to reach the door and called for help. Plaintiff testifies that he has not recovered from the effects. There are no exceptions to evidence. The motion to nonsuit was properly denied.

There has been considerable discussion by judges and textwriters as to the liability of an innkeeper for personal injuries sustained by a guest. Cases are to be found where the innkeeper has been held liable for assaults by servants, and cases *contra*. But it seems now to be well settled that in case of an injury occurring in consequence of the unsanitary and defective condition of the inn premises, or room to which a guest is assigned, the innkeeper is liable upon the same principles applicable in other cases where persons come on the premises at the invitation of the owner or occupant and are injured in consequence of their dangerous condition.

The innkeeper is not an insurer of his guests' personal safety, but his liability does extend to injuries received by the guests from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. *Ten Brock v. Wells*, 47 Fed., 670; *West v. Thomas*, 97 Ala., 622; *Stanley v. Bircher*, 78 Mo., 245; 16 Am. and Eng., 547; *Sandys v. Florence*, 47 L. J. C. Pl., 598; 22 Cyc., 1081.

This is not only the settled law of this country, but is held by the courts of Great Britain.

One who keeps a public house extends an invitation to all to come on his premises, and is therefore liable for injuries sustained in consequence of the bad condition of his inn premises. *Oxford v. Prior*, 14 W. R., 611. This principle is applied in cases of warehousemen, common carriers, and the like. *Finch v. R. R.*, 151 N. C., 106; Fetter on Carriers, 228. When the plaintiff proved the unsafe and defective condition of the gas fixture, in consequence of which gas escaped during the night and injured him, he made out a *prima facie* case of negligence, which it was defendant's duty to answer.

The learned counsel for defendant, Mr. McMullan, in a well considered argument, insists that the plaintiff is guilty of contributory negligence upon his own evidence, and for that reason the motion to nonsuit should have been sustained. We are not prepared to go that far under the circumstances in which plaintiff was placed.

It is undoubtedly true that if the defect is an obvious one, the guest must use reasonable care on his part, and if he is himself negligent and could have avoided the injury by due care, he cannot recover. 22 Cyc., 1081, and cases cited.

There are circumstances when the court can declare as matter of law whether a person has exercised reasonable care, but there are conditions when the question can only be solved by adopting the rule of the prudent man and submitting the matter to the jury. We think, under the conditions surrounding plaintiff, it cannot be fairly held that he necessarily failed to exercise due care as a matter of law. He fixed the key, as he thought, safely so as to cut off the gas. Smelling none, he retired and went to sleep. The gas may have escaped through the loose key during the night by reason of continued pressure, the key not being firm enough in place to hold it.

We think the question one peculiarly for the jury under such circumstances, and that it was fairly presented by the court to them.

We find no error in the charge of which the defendant can justly complain.

No error.

G. W. HARDISON v. JOSEPH M. REEL.

(Filed 8 March, 1911.)

1. **Precedence—Authority.**

It is, at least, a persuasive argument against the maintenance of an action for an alleged wrong that, in the manifold complexity of human affairs, no appeal for the redress of a like grievance has found its way into the courts.

2. **Contract—Sealed Bids—Mail Carrier—Promise—Tort—Legal Right.**

Conduct, though improper and causing loss to another, does not constitute a tort unless a legal, as distinguished from a moral, right is violated, and the damage conforms to the legal standard, except where it is presumed, as in the case of nominal damages.

3. **Same—Suppress Competition—Conspiracy—Notary Public—Interpretation of Statutes.**

One who makes a sealed bid required for the contract of carrying the United States mails cannot sustain an action for damages against the notary public before whom the bond was justified, in accordance with the Federal statute, upon the ground that he requested the notary not to divulge the amount of his bid, and the notary, knowing the amount, underbid him and obtained the contract. (1) There has been no violation of a legal duty alleged or shown; (2) had the notary promised not to compete with plaintiff in the biddings, it would, as an agreement to suppress competition, have been against public policy, the notary being qualified to bid under the circumstances; (3) the fact that defendant acted as a notary in his official capacity would not make him liable upon the breach of promise, if one was implied, to do an unlawful act; (4) a promise of the kind sued on is expressly condemned by the Federal act in question.

4. **Contracts—Mail Carrier—Right to Reject Bids—Damages Consequential.**

Under the Federal statute regulating the bidding by private parties for a contract to carry the United States mail, the department of the Government reserves the right to reject any and all bids if, in its judgment, the good of the service requires it. Hence, damages are too contingent to be recoverable by one in an action against a notary before whom his bond was justified, as required by the statute, which is based upon the allegation that the notary used the information he thus acquired to underbid the plaintiff and obtain the contract. The plaintiff may or may not have received the contract.

APPEAL from *Ward, J.*, at October Term, 1910, of PAMLICO.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

D. L. Ward, W. D. McIver, W. T. Caho, and Z. V. Rawls for plaintiff.

Simmons & Ward and Moore & Dunn for defendant.

WALKER, J. The following is plaintiff's case: He had been a mail carrier from Grantsboro to Kershaw in this State, and his term, fixed by contract, was about to end, when he applied to the proper branch of the Government for another term of four years. The rules of the department required that advertisement should be made for bids, which should be sealed and sent to the Post-office Department and accompanied by a bond, prepared and justified, according to official directions, before an officer qualified to administer an oath, blank forms being furnished for that purpose. Contracts for carrying the mails are usually let to the lowest bidder. Plaintiff handed the blank bond to the defendant, who was a notary public, and requested him to fill it out for him, which he did, and then administered the oath to the surety, who justified, and the bidder. The plaintiff paid the notary's fee of $1 and told him that he did not want any one to know the amount of his bid, which was $800. A few days after the plaintiff's bid and bond had been filed with the department, he learned that the defendant had underbid him, at first bidding $794, and afterwards lowering his bid to $736. Plaintiff, when he received this information, attempted to change his bid, but found that he was too late, as the time for receiving bids had expired. The contract was awarded to the defendant, and the plaintiff brings this action to recover damages, upon the theory that he lost the contract by the conduct of the defendant, and, therefore, in contemplation of law, has been injured. The judge who presided at the trial thought otherwise, and rendered judgment of nonsuit, from which the plaintiff appealed.

This seems to be an action of first impression. We have not been able to find any precedent for it. This circumstance, of itself, forms quite a strong objection to it, though not an insuperable one, but "if a case in law has no cousin or brother, it is a sure sign that it is spurious." It is, at least, a persuasive argument against the maintenance of an action for an alleged wrong that, in the manifold complexity and variety of human affairs, no appeal for the redress of a like grievance has found its way into the courts. Conduct, though improper and causing a loss to another, does not constitute a tort, unless a legal, as distinguished from a moral, right is violated, and the damage conforms to the legal standard (1 Jaggard on Torts, p. 86), except where it is presumed, as in the case of nominal damages. *Chaffin v. Mfg. Co.,* 136 N. C., 364. In administering the law, courts have nothing to do with the moral quality of an act where no legal right is invaded. This rule finds an illustration when one person trusts to the mere gratuitous promise of favor from another. The law will not protect him from the consequences of his undue reliance upon the integrity of the other party to the promise, and will not hold the latter liable for its infringement by faithlessness and treachery. 1 Cyc., 645. So, in this case, the plaintiff has been the victim of misplaced confidence, and that, we think, is all there is to it. We might sympathize with him and reprobate the conduct of his alleged betrayer, but cannot help him. But is he free from blame? Does he come before us with clean hands? We will see. The plaintiff told the defendant, at the time the latter administered the oath, that he must not disclose the amount of his bid to any one. This is all that was said, and it was intended to prevent competition. The defendant did not promise to comply with the request, unless his silence implied a promise of that kind. But if he had, the plaintiff's situation would not be improved. He is not sued for a breach of any such promise, but because, as plaintiff alleges, he was forbidden by the circumstances to compete with him by bidding for the contract. The defendant was the successful bidder for the contract, and no one else. But if there had been plenary evidence of such an arrangement between them (and there was none), would it entitle the plaintiff to recover? We think not. It would at least place him in the unenviable position of conspiring with the defendant to suppress competition, and thereby to injure the Government, which is morally and legally wrong. The plaintiff insists, however, that the defendant was acting in an official character, and for his services received his fee, and sustained a confidential relation towards him, and therefore impliedly agreed not to bid. But is an implied promise, if there was such, to do an illegal act, any better than an express one, as the foundation of a legal right for the violation of which an action will lie? The illegal purpose infects the whole transaction and destroys all right of action, if otherwise there would be one. The authorities clearly recognize the principle that where an agreement, without regard to its form, is made for the purpose of preventing free and fair competition, or of stifling or chilling biddings at public sales, or in the letting of contracts by the Government, or for the purpose of giving undue advantage to either of the parties thus engaged in dealing with reference to the biddings, it is contrary to public policy and void. *King v. Winants,* 71 N. C., 469; *Blythe v. Lovingood,* 24 N. C., 20; *Hoffman v. McMullan,* 83 Fed. Rep., 372; *Atchison v. Mallon,* 43 N. Y., 147; *Weld v. Lancaster,* 56 Me., 453; *Bellows v. Russell,* 20 N. H., 427; *Hannah v. Fife,* 27 Mich., 172. Such an agreement as the one in question was held to be void in the following cases: *Kennedy v. Murdick,* 5 Harrington (Del.), 458; *Gulick v. Ward & Bailey,* 10 N. J. Law (5 Halst.), 87; *Swan v. Corpening,* 20 Cal., 182; *Sharp v. Wright,* 35 Bard., 236. See *Ray v. Mackin,* 100 Ill., 246; Greenwood on Public Policy, pp. 178-9. The law under which the Post-office Department is authorized to let contracts for carrying the mails by competitive bidding expressly condemns such an agreement, and if any person holding a contract of the kind attempts to suppress biddings for a new term, he is disqualified to bid for five years, and if his offense is repeated, he becomes forever ineligible as a bidder. 2 U. S. Comp. Statutes, sec. 3950. As no enforcible right can be founded upon an agreement the effect of which is to prevent or diminish competitive bidding for public contracts (*Hunter v. Pfeiffer,* 108 Ind., 197), the defendant was left free to bid for himself, and wrong can never be predicated on an act which the law permits. 1 Jaggard on Torts, p. 89.

But if the plaintiff had technically a good cause of action, he could not recover substantial damages, as it was by no means certain that he would have received the contract if defendant had not intervened with his bid. The department, under the law, reserves the right to reject any bid if, in its judgment, the good of the service requires such a course to be taken, and when this contingency exists, we have held that there can be no consequential damages, *Walser v. Tel. Co.,* 114 N. C., 440; *Machine Co. v. Tobacco Co.,* 141 N. C., 284; if in such a case there can be a cause of action, which we need not decide.

No error.

WALTER E. MORTON *v.* BLADES LUMBER COMPANY ET AL.

(Filed 8 March, 1911.)

1. **Deeds and Conveyances—Husband and Wife—Entireties—Survivorship.**

   When land is conveyed to husband and wife jointly they take by entireties, and upon the death of one the whole belongs to the survivor.

2. **Same—Tenants in Common—Partition—Evidence.**

   When lands are purchased by the husband, and under his instruction are conveyed to him and his wife, jointly, by deed of bargain and sale, with full covenants of warranty, the doctrine of survivorship is not affected by the fact that the lands so purchased were a part of lands conveyed by his father, W., to a guardian for the benefit of the children of W., there being no evidence upon the face of the deed to the husband that it was made in pursuance of a scheme to divide lands held in common among the children of W. *Harrington v. Rawls,* 131 N. C., 40; 136 N. C., 65, and *Sprinkle v. Spainhour,* 149 N. C., 224, cited and distinguished.

APPEAL by plaintiff from *Ward, J.,* at November Term, 1910, of CRAVEN.

The facts and issues are more fully stated in the appeal of the defendant, the Blades Company, and incorporated, in this case, in the opinion of the Court by *Mr. Justice Brown.*

His Honor directed the jury to answer the first issue "Yes." Plaintiffs excepted and appealed. This issue is as follows:

1. Did Mollie E. Morton, widow of M. F. Morton, become the owner in fee of the lands in question at the death of M. F. Morton? Answer: Yes.

W. D. McIver for plaintiffs.

Guion & Guion, Moore & Dunn for defendant, the Blades Company.

No counsel or brief for defendant Mollie E. Morton.

BROWN, J. The plaintiffs are the children of the defendant Mollie E. Morton and of her husband, Mike F. Morton, who died intestate, leaving plaintiffs as his heirs at law.

The land in controversy was originally the property of William Martin, who conveyed it with other lands to D. W. Morton, guardian of his four children, M. F., D. W., J. A., and Kate A. Morton, by deed dated 12 January, 1881.

The tract in controversy was conveyed on 12 June, 1891, by Joseph A. Morton and wife to Michael F. Morton and Mollie E. Morton, his wife, by deed of bargain and sale, with full covenants of warranty, for the consideration of $500, and is the only tract described in the deed.

It is claimed by the defendant Mollie E. Morton, as well as by the Blades Company, that when her husband died she acquired the title in fee by survivorship.

The plaintiffs claim that the deed was intended as a partition of the lands conveyed by William Martin to D. W. Morton, guardian, and that the doctrine of survivorship does not apply, upon the principle laid down in *Harrington v. Rawls,* 131 N. C., 40; same case, 136 N. C., 65; *Sprinkle v. Spainhour,* 149 N. C., 224.

We do not think that the principle upon which those cases were decided applies here. There is no evidence upon its face, or otherwise, that the deed to M. F. Morton and wife was made in pursuance of a scheme to divide lands held as tenants in common by the children of D. W. Morton, one of whom was M. F. Morton.

In *Harrington v. Rawls, supra,* it appears that several mutual quitclaim deeds were executed dividing certain lands among the tenants in common, one of whom was Mrs. Briley. Instead of the quitclaim deed being made to her, it was made to her and her husband. After her death the husband claimed the land by survivorship. This Court held that the quitclaim partition deed conveyed no title to the husband, but was only a severance of the unity of possession. It is said in the opinion that "Elsie Briley took no new title by purchase, but held by descent from her father, and the insertion of her husband's name in the mutual deeds of quitclaim and release conveyed nothing to him."

The deed in this case is not a quitclaim, but a deed of bargain and sale, with full covenants of warranty, accepted by the husband, and doubtless made in manner and form at his instance as a provision for his wife if she should survive him.

As the husband purchased the property and paid the purchase price of $500 for it, he had full power to have the deed made to him and his wife, and is presumed to know the legal effect of his act.

A very different case is presented where the husband has a deed for property belonging to or paid for by the wife made to himself and to her jointly for the purpose of survivorship. It is needless to discuss that question now.

We see nothing in this case which takes it out of the well-settled doctrine of the common law, that when land is conveyed to husband and wife jointly they take by entireties, and upon the death of one the whole belongs to the survivor. This has been decided so often by this Court that it is not necessary to cite the cases. They will be found all through our Reports from *Topping v. Sadler,* 50 N. C., 357, to *Hood v. Mercer,* 150 N. C., 699.

The judgment of the Superior Court upon plaintiff's appeal is

Affirmed.

STATE EX REL. W. H. JONES v. JESSE RIGGS.

(Filed 8 March, 1911.)

Parties—Interest—Oyster Beds—Vacate Grants—Attorney-General—Authorization.

One who has no interest in the lands, other than that of a citizen of the State, cannot maintain an action to vacate a grant to an oyster bed (Revisal, 1748, 1750), and under such circumstances the Attorney-General is the only one who may maintain the action, it being his duty alone to look out for the interests of the State in such matters; and his authorization to another to bring the action is insufficient. Cases of *quo warranto* distinguished.

APPEAL from *Ward, J.*, at Fall Term, 1910, of PAMLICO.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

R. A. Nunn and W. D. McIver for plaintiff.
Simmons & Ward and W. T. Caho for defendant.

CLARK, C. J. This action is brought in the name of the State on the relation of a private individual who has no interest in the land, other than as a citizen of the State, to vacate a grant to an oyster bed.

The relator claims a right to maintain this action under sections 1748 and 1750 of the Revisal. He cannot maintain it under section 1748, as that is limited to one claiming title to the land, covered by the grant under a patent or grant to himself, and the plaintiff makes no such claim. Nor can he maintain it under section 1750, as that authorizes only the Attorney-General to bring the action. Such action is to be brought only in behalf of the State, when the public interest requires it and when the State is the beneficiary. The power to bring such action is properly vested in the Attorney-General. It was not intended that any citizen of the State without any interest himself in the subject-matter should bring an action on behalf of the State. The State has a public officer whose duty it is to look after its interests in such matters.

It is true that in this case the action is brought by the plaintiff upon leave granted by the Attorney-General. But that is only to test the right of the plaintiff to maintain such action. The plaintiff is not a party in interest, in the meaning of the law, and cannot maintain the action in his own behalf, nor can the leave of the Attorney-General authorize him to maintain it in behalf of the State.

A *quo warranto* as to an office can be brought upon leave of the Attorney-General by any citizen who is a qualified voter and taxpayer of a municipal corporation, or of any jurisdiction over which the officer whose title is questioned exercises his duties and powers, though the relator is not himself a contestant for the office. But this is on the ground that he is a party in interest and has a direct interest in having the office occupied only by an officer who is entitled to it. *Foard v. Hall,* 111 N. C., 369; *Hines v. Vann,* 118 N. C., 6; *Houghtalling v. Taylor,* 122 N. C., 145; *Mott v. Comrs.,* 126 N. C., 877. But the plaintiff has no such interest in the title or ownership of the oyster bed.

The court properly sustained the demurrer and dismissed the action.

Affirmed.

BESSIE W. RICKS v. JESSE P. WILSON AND JULIA H. WILSON.

(Filed 8 March, 1911.)

1. **Deeds and Conveyances—Husband and Wife—Purchaser—Parol Trust.**

   When a husband pays the purchase money for lands and has the conveyance thereof made to his wife, the law presumes that the lands are intended for a gift, or a provision made for her by him, and such facts alone are insufficient to impress the lands with a trust in his favor.

2. **Deeds and Conveyances—Grantor—Parol Trust.**

   A conveyance of lands made by a father to his son without a consideration cannot impress the lands with a parol trust in favor of the father, however full and explicit the words may have been to that effect used at the time of the delivery of the deed; for a grantor, in delivering a deed, cannot retain control of the property, and by parol create a trust thereafter to be enforced in his own favor.

3. **Deeds and Conveyances—Married Women—Parol Trusts—Privy Examination—Constitutional Law.**

A conveyance by a married woman of her lands cannot be impressed with a parol trust contrary to the intent expressed in her written deed. The law requires a written instrument, with the husband's written consent, and her privy examination, for her to pass an interest of this character in her lands.

4. **Deeds and Conveyances—Parol Trust—Infants—Ratification—Execution of Trust.**

Having failed to show a parol trust in her favor under a deed to lands purchased by her father, but conveyed to her mother, plaintiff seeks to establish a lost deed made by her father, mother, and brother, defendants in this action, creating the trust interest for her in the lands, the title to the lands having previously to the execution of the alleged lost deed been conveyed by the father and mother to the brother, the latter of whom, at the time of the execution of the alleged lost deed, was a minor: *Held*, (1) the title in the lands being in the brother at the time in question, it was necessary for him, upon coming of age, to have ratified his deed made in his minority, and his answer denying its execution by him was an act of repudiation; (2) the doctrine that a minor may execute a valid deed in pursuance of a trust has no application.

5. **Deeds and Conveyances—Parent and Child—Parol Trust—Wills—Paper-writing—Evidence.**

A husband purchased certain lands and had the deed made to his wife, who thereafter by a proper deed, with her husband, conveyed the land to their son in fee simple. The plaintiff, their daughter, sought to impress the lands with a parol trust in her favor: *Held*, the will of her deceased father and a paper-writing executed by him, purporting to show that the title to the land was put in the son only for the purpose of an equitable division, were incompetent evidence; and therefore it was irrelevant to prove that such papers had been executed and destroyed in pursuance of a conspiracy to defraud plaintiff of her rights.

6. **Wills—Lost or Destroyed—Probate—Continues in Force.**

A will lost or destroyed before probate remains and continues in force as a will, the difference being the degree of proof required to establish it.

7. **Wills—Probate—Limitation of Actions.**

The statute of limitations does not apply to the mere taking of a probate.

8. **Executors and Administrators—Accounting—Parties—Procedure—Evidence.**

The plaintiff alleges that her father died in possession of a large amount of personal property, which the defendants, her mother and brother, had wrongfully appropriated. The plaintiff and her brother were the only children and heirs at law. The mother was the executrix of her husband, but was not made a party in her administrative capacity in this action, the purpose of which was to establish a trust in plaintiff's favor, in her father's land: *Held,* the plaintiff is not entitled to an accounting; her remedy in that respect is to bring an action against the administratrix and her brother, the other heir at law, for an accounting and settlement of the estate, wherein evidence may be offered as to sums of money or other property which the administratrix has received or should have received, and with which she is properly chargeable.

APPEAL from *Ward, J.,* at September Term, 1910, of PITT.

At the conclusion of the evidence a motion to nonsuit was sustained. Plaintiff excepted and appealed.

The facts are sufficiently stated in the opinion of *Mr. Justice Brown.*

Guion & Guion, Harry Skinner, and F. C. Harding for plaintiff.

Jarvis & Blow, Moore & Long, and Aycock & Winston for defendants.

BROWN, J. This cause came before us upon a demurrer to the complaint, which was overruled and the defendants directed to answer. The case appears in 151 N. C., 46, which is referred to for the general outlines of the plaintiff's allegations. Since then the plaintiff has filed an amended complaint in which she sets out her demands with much particularity and embodies in her pleading eleven prayers for judgment. As the several forms of relief asked are dependent upon the establishment by the plaintiff of a few leading propositions, it will not be necessary to consider her various demands *seriatim.*

There are some exceptions to the evidence presented upon the record, but, in the view we take of the case, it is unnecessary to consider them, as we have taken into account all the evidence offered by the plaintiff or relied upon to support her contentions, whether admitted or not.

1. It is contended by plaintiff that her father, Robert T. Wilson, during his lifetime purchased and paid for certain valuable lands in the county of Pitt, including a tract called the McDowell land; that while the purchase money was furnished and paid by her father, the deed was made, at her father's request, by the vendors to his wife, the defendant Julia, who is plaintiff's mother.

It is further averred that the defendant Julia held the said lands in trust for her said husband, and that on 23 January, 1899, R. T. Wilson and his said wife executed and delivered to their son, the defendant Jesse P. Wilson, a deed conveying said lands to him; but that at the time of, as well as before, the delivery of said deed, the grantors therein impressed upon the title a parol trust binding upon the grantee and accepted by him, to the effect that the said Jesse P. Wilson should receive and hold the naked legal title to said lands in trust to convey the same to whomsoever the said R. T. Wilson, grantor, should direct and appoint, either by deed, will, paper-writing, or orally, for the purpose of making a proper and equitable division of the lands conveyed and of other property, personal, real, and mixed, of which the said R. T. Wilson was seized and possessed, between his two children, the plaintiff Bessie and the defendant Jesse P. Wilson.

There are insuperable obstacles to the establishment of this alleged trust. Assuming, for the sake of argument, that it is competent to fasten such a trust upon the wife in behalf of her husband, there is no evidence whatever in this record tending to establish it, or that she accepted the lands other than as a gift or provision made for her by her husband. The mere fact that the husband paid the purchase money and had the deed made by the vendor to his wife does not create a resulting trust in his favor. While it is an established principle of equity that an equitable interest in land is drawn "as if by irresistible magnetic attraction" to the one who pays the purchase money for it, this principle does not apply where the husband furnishes the money and has the deed made to the wife.

The law presumes in such case that the property is given as a gift or provision for the wife's benefit, as the husband is under a moral as well as legal obligation to support her. *Thurber v. LaRoque,* 105 N. C., 307; *Flanner v. Butler,* 131 N. C., 153. This principle is reversed where the wife supplies the purchase money and the deed is made to the husband, in which case a trust results in her favor.

There is abundant evidence that R. T. Wilson attempted, when he delivered the title deed to his son, to impress upon it the trust averred in the complaint. Whatever may be the moral obligation of the son to heed and carry out the wishes of his parent as a trust which the law can enforce, it must fail.

The principle is well established in this State that where the grantee accepts a deed for property for which he himself pays nothing, under agreement, accompanying the delivery, that he will hold the same for the benefit of or convey the same to a third person, a parol trust is created in favor of the latter. But it is held that the grantor, in delivering a deed, cannot retain control of the property and, by parol, create a trust to be thereafter enforced in his own favor. *Gaylord v. Gaylord,* 150 N. C., 222. But, assuming, as is contended, that the trust attempted to be created was not solely for the benefit of R. T. Wilson, but to secure a fair division of the property between his two children, we have shown that the land did not belong to R. T. Wilson, but to his wife; and how could he impress a trust upon her property?

It cannot be successfully contended that the real estate of a married woman can be passed contrary to the intent as expressed by her in a written deed, because she sat silently by and heard her husband state before and after the execution of the said instrument that part of the lands thereby conveyed were intended for some person whose name does not appear in the written instrument. The husband is not his wife's agent, and his admissions do not bind her. *Strother v. R. R.,* 123 N. C., 198; *Thurber v. LaRoque, supra; Smith v. Bruton,* 137 N. C., 80.

Assuming that the vague expressions uttered by the wife on the occasion were sufficient to impress a trust upon the land in the hands of her son, which we do not admit, a woman under coverture cannot create a trust by parol or in any other manner except by embodying it in a written instrument, with her husband's consent, to which her privy examination must be taken as required by our law. This is the logical deduction from all of our numerous decisions. *Farthing v. Shields,* 106 N. C., 289; *Thurber v. LaRoque, supra,* and cases cited. She can only dispose of or encumber her real property in the way prescribed by the Constitution and statute-law of the State.

It not only follows as the logical result of our many and uniform decisions, but it is held elsewhere, and stated by text-writers, that a married woman cannot, where her legal status and to convey is regulated as in this State, create a parol trust in land, and that to do so would be but a subterfuge to evade the provisions of the statutes protecting her. The privy examination, absolutely essential to the validity of the conveyance, can only extend to what appears to the examining officer upon the face of the instrument. Cord Legal and Equitable Rights of Married Women, sec. 689; Lewin on Trusts, p. 23. "This principle," says the learned editor of A. and E. Enc., "would surely apply to the creation of a trust of her own property, but, *quære,* whether applicable to her declaration as to property of which the beneficial interest was never in her." Vol. 28, p. 881, note 5, and cases cited, 16 Cal., 534. This is based upon the theory that the creation or declaration of a trust in lands is a conveyance of an interest therein. Hence, the same reason which renders the deed of a married woman void as a conveyance of the title would render void an attempted declaration of a trust by her.

This is held by the courts in States having statutes similar to ours. *Tatge v. Tatge,* 34 Minn., 272; 65 Pa. State, 386; *Purcell v. Goshorn,* 17 Ohio, 105.

It would seem, therefore, that the plaintiff must fail in her first contention.

2. The next contention of the plaintiff is that R. T. Wilson and the defendants Julia H. and Jesse T. Wilson, in the year 1900, executed and delivered to her a deed in fee for the McDowell land, and that said deed has been either destroyed or lost. Plaintiff asks that said deed be established by the judgment of the court, that she recover the McDowell lands, and that defendant Jesse account to her for the rents and profits thereof.

There is evidence by the plaintiff that a deed to her for the McDowell land was executed in August, 1902, by her father and the two defendants and delivered to her; that it was proven before a justice of the peace, and that it has been lost or destroyed and never recorded. The execution of such instrument is denied.

At the time of the alleged execution of said deed the legal title to the McDowell land, subject to the life estate of his parents, was in the defendant Jesse, and he was a minor about 15 years of age. There is no evidence that, since becoming of age, he has ever ratified and confirmed the deed. On the contrary, in his answer, he denies its execution, which is a repudiation of it. The plaintiff seeks to avoid this by averring that the defendant, though a minor, in executing the deed was but giving effect to a power of appointment and disposition reserved by his father, and was carrying out the trust impressed upon his title in 1899, and that a minor may execute a valid deed in pursuance of a trust.

As we have held that the legal title made to the defendant Jesse by the deed of 23 January, 1899, was not impressed with any trust, and that R. T. Wilson had no power of disposition over the fee after the execution of that deed, this contention of the plaintiff cannot be successfully maintained.

3. It is further averred that, prior to the execution of the deed to Jesse, the father, R. T. Wilson, executed his last will and testament, by which he devised to plaintiff the McDowell land and one-half of all his real and personal estate; and that soon after the death of the testator this will was destroyed by

the defendants in pursuance of a conspiracy entered into with defendant Julia's sister to defeat the plaintiff of any interest in her father's estate. Plaintiff further avers that after the execution of said deed in 1899 to Jesse, the father, R. T. Wilson, executed another paper-writing specifying in every particular how his estate should be divided between his two children, and declaring in it that he had reposed the legal title to his lands in his son for the purpose of bringing about an equitable division of his estate between him and his sister. Plaintiff asks that these paper-writings be established by decree of the court.

These paper-writings are worthless as evidence of a declaration of a trust impressed by R. T. Wilson upon the legal title transmitted to his son by the deed of 23 January, 1899, for the reason, as we have shown, that said Wilson did not own the lands, and had no power when he joined in said deed with his wife to create a trust binding upon his wife.

If the plaintiff desires to set up the paper-writing as a will and devise, for the purpose of claiming under it as a testamentary paper the property real or personal devised to her and not covered by the deed of 23 January, 1899, then she should proceed before the clerk of the Superior Court to offer the same for probate.

This Court has held that a will which has been lost or destroyed before probate remains and continues in force as a will. "The only difference between the probate of a will which can be produced and one which has been lost is as to the nature and quantity of the evidence required to prove it. The jurisdiction to prove the will is not changed by its loss." *McCormick v. Jernigan,* 110 N. C., 406. The form for probate of lost wills, as is said in that case, is in Smith's Probate Law (3 Ed.), 13 Am. and Eng., 1077.

It is further said that the statutes of limitation do not apply to the simple taking of the probate of a will. *McCormick v. Jernigan, supra.* So the plaintiff may now, if so advised, offer the alleged will for probate in the proper jurisdiction.

4. The plaintiff further avers that R. T. Wilson died in pos-

session of over $10,000 in cash, which came into the possession of these two defendants, and that they have wrongfully appropriated the same as well as the notes, moneys, stock, crops, and provisions of said Wilson; and plaintiff avers that she is entitled to one-half thereof, and asks for an accounting.

It is unnecessary to discuss the evidence in support of this allegation, as the plaintiff is clearly not entitled to that relief in this action, as it is now presented to us.

It appears, incidentally only, in one of the prayers for judgment that the defendant Julia is the administratrix of her deceased husband; but she has never been made a party to this action in her administrative capacity.

The primary purpose of this action is to declare a trust in behalf of plaintiff, and the accounting is asked as a necessary consequence resulting from the establishment of such trust.

As the plaintiff has failed to establish the trust, her action fails.

In respect to this last demand, her remedy is to commence a proceeding against the administratrix and her brother, the other distributee and heir at law, for an accounting and settlement of the estate of her father. When that account is taken, evidence may be offered as to those sums of money and other property which the administratrix has received or ought to have received, and with which she is properly chargeable.

Upon a review of the entire record, we are of opinion that his Honor properly sustained the motion to nonsuit, and his judgment is

Affirmed.

JAMES R. DAVENPORT v. JOSEPH FLEMING.

(Filed 8 March, 1911.)

1. **Homestead—Interest—Estates.**

    A homestead in lands is not an estate therein, but a mere exemption right.

2. **Deeds and Conveyances—Creditors—Trustees—Homestead—Residue or Remainder.**

    The general power of alienation incident to ordinary ownership of real property exists as to all the residue or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, Article X, section 8, of the Constitution applying alone to the homestead interest, and none other.

3. **Deeds and Conveyances—Creditors—Trustee—Homestead Reserved—Purchaser—Estate Acquired.**

    A valid deed in trust made by a debtor in favor of his creditors, reserving to himself his homestead in lands conveyed therein, passes to the grantee all his right, title, and interest in the lands conveyed, excepting his homestead interest expressly reserved; and when such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee.

4. **Deeds and Conveyances—Trustees — Registration — Creditors — Subsequent Judgment—Homestead—Trespass — Injunction—Interpretation of Statutes.**

    A debtor made a deed in trust for the benefit of his creditors, expressly reserving the homestead. The trustee in the deed after allotment sold the land to the wife of the debtor, in a transaction without suggestion of fraud or irregularity: *Held*, a judgment creditor whose judgment was obtained subsequent to the execution and registration of the trust deed acquired no interest in or lien upon the homestead, and could not enjoin the cutting of the timber, within the allotted homestead, by the husband, acting therein under the direction of his wife. Revisal, sec. 686, is, expressly, to have no retroactive effect, and is inapplicable to this case; but if otherwise, by construction, the result is the same.

APPEAL from *Ward, J.*, at September Term, 1910, of PITT.

Civil action, heard on return to a preliminary restraining order.

On the hearing the relevant facts and disposition of the cause in the court below were made to appear, as follows:

1. That Joseph Fleming, the defendant, on 28 October, 1892, as appears of record in book M-5, page 253, in the register of deeds' office of Pitt County, conveyed the lands therein described to one Lunsford Fleming to secure creditors, and in the said deed of trust said defendant, Joseph Fleming, reserved his personal property and homestead exemption to be set apart, etc."

2. That on 12 December, 1892, the homestead of the defendant was duly allotted and set apart to him by metes and bounds as set out in the complaint.

3. That Lunsford Fleming, exercising the powers contained in the deed of trust of October, 1892, on 29 April, 1893, sold the lands conveyed in the said deed of trust before the courthouse door at Greenville, N. C., at public sale, as follows: (1) The reversion in that portion of the land which had been allotted to Joseph Fleming as a homestead; (2) all of said land conveyed in the said deed of trust except the homestead. At the sale, Isabella Fleming, wife of the defendant, Joseph Fleming, became the purchaser, both of the reversion to the homestead and of the lands outside of the homestead, receiving a deed on 29th of April from Lunsford Fleming, trustee: first, for the reversion of the homestead, and, second, to all the lands conveyed in the deed of trust aforesaid outside of the homestead, which deed was duly recorded and regularly admitted to registration in Pitt County.

4. That the plaintiff recovered the judgments, as set out in the complaint, 28 January, 1893, and at March Term of Pitt Superior Court, 1898.

5. That it is admitted in the pleadings that the defendant, Joseph Fleming, has cut timber from the lands included in the boundaries of the homestead as allotted, but his answer asserts that he cut the timber by the authority and under the direction of Isabella Fleming, owning the reversion to the homestead, and this is not denied; and that as a matter of law the defendant asserts that the judgments as set forth in complaint of plaintiff have never attached as a lien on the reversion to said homestead.

On these admitted facts in the record, the court holds, as a matter of law, that Mrs. Isabella Fleming is the owner of the reversion to the homestead; that the judgments set out in the complaint never attached thereto, and that the plaintiff has no lien thereon for which he can ask a protection of his security. It is, therefore, on motion, adjudged and decreed that the restraining order in this case heretofore issued be dissolved.

The plaintiff having intimated that he would take the case to the Supreme Court, it is agreed that the defendant be restrained from cutting timber upon said land until after a decision of the Supreme Court in this cause.

G. W. WARD,
Judge Presiding.

Plaintiff appeals to the Supreme Court; notice waived, and bond fixed at $25. WARD, *Judge.*

By consent, timber not to be cut till case is reviewed by Supreme Court. WARD, *Judge.*

Jarvis & Blow for plaintiff.
Harry Skinner for defendant.

HOKE, J., after stating the case: In *Fulp v. Brown,* 153 N. C., p. 533, the Court, in speaking to the question presented, said: "While our decisions have not been in entire accord as to the exact nature of the homestead interest referred to in these provisions, it has come now to be accepted doctrine that they do not create a new estate or confer any new property rights in an old one, but only an 'exemption right'—a 'determinable exemption,' as it has been called in some of the cases, operating on the creditor and the agencies provided for the collection of the debt by law and requiring, in the case of real estate certainly, that the exemption be given effect before a valid sale can be made." This, and a decision at same term in *Sash Co. v. Parker,* 153 N. C., 130, in which it was held among other things, "That a homestead in lands is not an estate therein, but a mere exemption right," were in recognition of the principle contained and established in the case of *Joyner v. Sugg,* 132 N. C., 580. That was a petition to rehear a decision in the same case, 131 N. C., 324, and the Supreme Court in upholding the petition and in reversal of its former ruling held in effect that the homestead interest provided for in Article X of our Constitution was only "an exemption right, a determinable exemption," and that where this right obtained, whether it had been allotted or otherwise, the general power of alienation incident to ordinary ownership of real property continued to exist as to any and all the residue or remaining interest in the property, and unaffected by the restrictive features of section 8 of Article X, these features applying only to the homestead interest itself, and none other. In the case referred to, the position indicated was declared and maintained in a learned and elaborate opinion by *Associate Justice Walker,* for the Court, as expressing the correct purport and meaning of the constitutional provision, as being grounded in right reason and in line with a large number of well-considered decisions bearing directly on the subject. From this, we think it follows that when the ownership of a tract of land and any and all interest therein, except this homestead interest, has been passed from the debtor by valid conveyance, and such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee in such conveyance; and where such conveyance has become effective before a judgment is docketed, that there is no estate in the debtor to which a judgment lien could attach and no interest of the judgment creditor in the property that would call for or permit the interference of a court in his behalf by injunction or otherwise.

In the present case, prior to any judgment docketed or any lien acquired, the debtor conveyed the entire land in trust for creditors, "reserving from the operation of the instrument the homestead and personal-property exemption of the said Joseph Fleming." After the execution of this deed, the homestead having been duly allotted, the trustee sold and conveyed the tract of land except the homestead, and also the reversion after the homestead interest, to Isabella Fleming. There is no allegation or suggestion of fraud or irregularity in the transaction, and on the facts in evidence, and applying the principles recognized and upheld by the decisions referred to, we are of opinion that there is no right in the judgment creditor to stay the cutting of timber on the land contained in the homestead. This position in no way conflicts with the decision in *Jones v. Britton,* 102 N. C., 166, to which we were referred by counsel. In that case the reversion in the land after the homestead interest was in the debtor at the time the judgment lien attached, and the debtor was restrained from destructive waste. The complaint alleged, and the evidence tended to show, that "At the time said judgment was docketed the defendant was entitled to the right of homestead and was *seized* and *possessed* of the land, etc.," and the ruling as stated was based on the fact that the debtor owned the land when the judgment was docketed.

A construction of section 686 of the Revisal does not seem to be involved in this appeal, for the section itself contains the provision that the same shall have no retroactive effect, and the determinative facts all transpired before the section was enacted. Chapter 3, sec. 3, Laws 1905. But if it were otherwise, the same position would prevail. A perusal of the entire section gives clear indication that the portion of the law providing for the enforcement of liens which attach prior to the conveyance of the homestead refers to liens which attach to the land on which the homestead had been or may be allotted. Accordingly, in a recent case construing the statute, *Sash Co. v. Parker, supra,* it appears that the judgment debtor owned the land at the time the lien attached. The decision in *Joyner v. Sugg, supra,* was made on facts very similar to those presented here, the headnote being as follows: "A deed in trust by the husband, in which the wife does not join, reserving the homestead of the grantor therein, conveys the entire land contained in the deed of trust, subject only to the determinable exemption in $1,000 thereof from the payment of the debts of the grantor during his life"; and the case throughout is an apt authority in support of the present ruling.

There is no error, and the judgment below is

Affirmed.

BRYAN TRIPP v. HENRY HARRIS.

(Filed 8 March, 1911.)

1. **Mortgages—Principal and Surety—Payment by Surety—Assignment of Mortgage—Debtor and Creditor—Security.**

When the surety pays a note of his principal, and has the note and a mortgage securing it transferred directly to himself, he becomes a simple contract creditor of the principal and the owner of the mortgage to secure the payment of the debt. This case is distinguished from those wherein a judgment has been obtained against the principal and surety, or where there is a mortgage and the rights of third persons as creditors or purchasers have intervened.

2. **Same—Landlord and Tenant—Liens—Priority.**

The plaintiff, a landlord, became surety on his tenant's note and joined with him in a mortgage of the former's personal property and on the crops to be raised by the tenant during that crop year. He also made advances to the tenant to enable him to make the crop. The tenant, the defendant, failed to pay the note and his landlord paid it, as surety, and had the note and mortgage assigned to himself: *Held*, the effect of the plaintiff's executing the mortgage was to relinquish his landlord's lien on the crop in favor of the mortgagee, and not to surrender his rights against the tenant; and having paid the note, he could first apply the proceeds of the sale of the crop to the satisfaction of his superior lien as landlord, against the will of the tenant, the defendant. *Lee v. Manly*, *ante*, 244, cited and distinguished.

APPEAL by defendant from *Ward, J.*, at September Term, 1910, of PITT.

On 21 January, 1909, the defendant, who was then a tenant of the plaintiff, purchased a horse of J. R. Harvey & Co., at the price of $130, and executed his note therefor, to which the plaintiff was surety. On the same day the defendant executed to the said Harvey & Co. a chattel mortgage to secure said note, by which he conveyed said horse, an iron-axle cart, and the crops to be raised by him in 1909. The plaintiff joined in said mortgage. The defendant failed to pay said note when it became due, and thereafter the plaintiff paid the amount thereof to Harvey & Co., and the note and mortgage were assigned to him.

The plaintiff, as landlord, made advances to the defendant during said year to enable him to make a crop, amounting to $289.34, and he received from the proceeds of the crops $239.38. The defendant demanded that said proceeds be applied to the satisfaction of said debt and mortgage of $130, which the plaintiff refused to do. The plaintiff applied the proceeds of the crop to said account for supplies, and brings this action to recover the horse and cart, claiming to be the owner by virtue of said mortgage. The defendant resists recovery upon two grounds:

(1) That a payment by the plaintiff, who was surety, and taking an assignment to himself, extinguished the mortgage.

(2) That by executing the mortgage, the plaintiff agreed that the crops should be applied in payment of the debt of $130, and that this could not be changed without the consent of the defendant.

Jarvis & Blow for plaintiff.
Julius Brown for defendant.

ALLEN, J., after stating the case: Counsel for defendant has cited a large number of cases from our Reports, holding that a payment by the surety, without taking an assignment to a trustee, extinguishes the debt, but these cases will be found to belong to one of two classes.

In one class are judgments against principal and surety, and notes and bonds executed by both. In such case, payment by the surety without an assignment to a trustee is held to be a satisfaction of the evidence of the indebtedness as it then existed, and the surety becomes a simple contract creditor of his principal.

In the other class are notes or bonds secured by mortgage, and the rights of a third party as creditor or purchaser intervene.

Our case belongs to neither class. We have here a note which the surety has paid, secured by a mortgage, and the contest is between the principal and his surety.

It seems, according to the opinion of *Chief Justice Ruffin* in

Hanner v. Douglass, 57 N. C., 265, that prior to the Statute of Anne, the rule in England was that the surety, upon payment of a note or judgment, could take an assignment to himself or to another for him, and that after that statute the assignment was made to a trustee for his benefit, to avoid any difficulty from a plea of payment; but that before and after the statute a mortgage given to secure the debt could be assigned directly to the surety. After stating this doctrine, he adds: "In this State the same doctrine has prevailed, with this modification, that, in order to keep the security on foot, when it is a bond or judgment, it is necessary to take an assignment to a third person." To the same effect is *York v. Landis,* 65 N. C., 536. The note or bond is the evidence of the indebtedness, and when it is paid, without an assignment to a third person, it ceases to exist, but there is an implied promise upon the part of the principal to repay the surety. The mortgage is the security for the debt and collateral to it.

In *McCoy v. Wood,* 70 N. C., 129, *Justice Rodman,* speaking for the Court, says: "The law is, that if a surety pays a bond of his principal, for which there is no collateral security, the bond is thereby extinguished, unless he takes an assignment to a trustee. But in equity it is held that if the creditor has taken a collateral security for the debt, the surety, on payment, is subrogated to the rights of the creditor in the security without an express assignment."

In *Liles v. Rogers,* 113 N. C., 200, *Chief Justice Shepherd* announces the doctrine as follows: "As soon as a surety has paid the debt, an equity arises in his favor to have all the securities which the creditor holds against the principal debtor transferred to him, and to avail himself of them as fully as the creditor could have done. The securities referred to do not include those which are extinguished by the payment of the debt, such as the bond securing such principal debt, and unless the surety procures it to be assigned for his benefit to a third person, it is utterly extinguished both at law and in equity, and he becomes a simple contract creditor, and entitled to be subrogated only in respect to the collateral securities taken and held by the creditor," and in the same opinion he quotes with approval from *Lord Eldon* that, "In the case, for instance, wherein, in addition to the bond, there is a mortgage with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond, but the creditor has a mortgage and I have a right to the benefit of the mortgaged estate which has not got back to the debtor.'"

The text-books and the decisions from other States are in accord with this view, except in a number of the States the surety is treated as a purchaser, and he takes the evidence of indebtedness and all securities as they existed in the hands of the creditor. We cite a few authorities from a large number: Sheldon on Subrogation, secs. 86 and 87; *Lewis v. Palmer,* 28 N. Y., 271; *Tarp v. Gulseth,* 37 Minn., 135; *Garson v. Brown,* 11 Pa. St., 531.

In Brandt on Suretyship, sec. 347, it is said: "A surety who pays the debt of his principal is entitled to subrogation to a mortgage given by the principal to the creditor for the security of the debt, and he may, with or without a formal assignment thereof, have the same foreclosed in his own name, for his benefit."

We therefore conclude that the plaintiff, upon paying the note, and taking an assignment to himself of the note and mortgage, became a simple contract creditor of the defendant and the owner of the mortgage to secure payment of his debt. He was also landlord, and his lien on the crops to secure advances was superior to that as owner of the mortgage, and he had the right, against the will of the defendant, to apply the crops first to the account for supplies, unless his act in signing the mortgage prevents him from doing so. We do not think it has this effect. The purpose and effect of the execution of the mortgage was to relinquish his lien in favor of Harvey & Co. to enable the defendant to buy a horse, and not to surrender his rights against his tenant. It is this condition which distinguishes this case from *Lee v. Manly, ante,* 244.

If the contention of the defendant should prevail, he would have a horse for which he promises to pay $130, and upon which he gave a mortgage to secure the debt, without the payment of one cent, and the plaintiff, his surety, must bear the loss.

We find no error, and the judgment is

Affirmed.

H. A. BROWN v. EAST CAROLINA RAILROAD COMPANY.

(Filed 15 March, 1911.)

1. **Appeal and Error—Referee—Findings—Judgment—Evidence.**
   The findings of fact by a referee, supported by evidence and sustained by the trial court, are not reviewable on appeal.

2. **Deeds and Conveyances—Contracts—Interpretation—Intent—Entire Instrument.**
   In the interpretation of a deed or contract, the intent of the parties, as embodied in the entire instrument, must prevail, and each and every part must be given effect, if it can be done by any fair and reasonable intendment.

3. **Same—Railroads—Material Delivered—Accessibility—Additional Work—Damages.**
   In an action to recover a balance alleged to be due the plaintiff under his contract with defendant to build a railroad trestle, and for damages for failure to supply material stipulated for in the manner provided for in the contract, it appeared from the contract sued on that the defendant agreed "to deliver all material for the trestle on cars or on the ground within 300 feet of the trestle, and to be furnished in such manner and time as not to impede the plaintiff (contractor) in the performance of his part of the contract": *Held*, (1) the contract contemplated that defendant should deliver the material within 300 feet of the work, at a point from which a haul could be made to the best advantage, having reasonable regard to the nature of the ground and the attendant facts and circumstances; (2) that under a contract of this character and extent, requiring completion within a specified time, delivery of the material within the specified distance from the work, but across a slough, requiring an additional haul of half a mile, was not such delivery by defendant as called for in the contract, and for such additional work the plaintiff was entitled to recover extra compensation.

4. **Contracts—Breach—Appliances—Definite Rental—Measure of Damages.**

When a building or a given machine is shown to have a definite rental value, and the opportunity for obtaining it is lost by another's breach of contract, the rental value of the machine usually affords a better basis for the ascertainment and award of damages, subject to the rule that the damages must have been in the reasonable contemplation of the parties and capable of ascertainment with a reasonable degree of certainty. *Rocky Mount Mills v. R. R.*, 119 N. C., 693, holding that interest on the value is the proper measure of damages, and other like cases cited and distinguished.

5. **Same—Railroads—Pile Drivers.**

In an action by plaintiff to recover damages of the defendant railroad alleged by breach of contract requiring the latter to supply at certain places, under the terms of the contract, material for the former to build a trestle, there was a confirmation by the lower court of the referee's findings, upon evidence to support them, that by reason of such delay plaintiff's pile driver remained idle for thirty days at a net rental value of $2.50 per day, and this was not infrequently rented by plaintiff for a definite sum: *Held*, the measure of damages was the rental value of the pile driver for the time it remained idle through defendant's default, under the contract.

APPEAL from *Ward, J.*, at September Term, 1910, of GREENE.

Civil action, heard on exceptions to report of referee. There was evidence tending to show that on 16 September, 1907, plaintiff and defendant company had entered into a contract that plaintiff was to construct for defendant a trestle and fender over Contentnea Creek near Hookerton, N. C., the same to be built in a substantial and workmanlike manner and completed by first of December, 1907; and defendant, on its part, agreed that it would furnish and supply "On board cars, or on ground within 300 feet of said trestle, all of the material to be used in the construction of said work, and same is to be furnished in such a manner and time as not to impede the said Brown in the performance of his part of the said contract. The work having been completed, the action was instituted to recover a balance alleged to be due plaintiff on the contract and also damages for failure to supply material in the time stipulated for in the contract. Defendant denied any and all liability to plaintiff, and set up, further, a counterclaim for damages by reason of failure to do the work properly and according to the terms and stipulations of the contract. The cause was referred, by consent, to Messrs. L. R. Varser and Thomas D. Warren and, on the hearing before the referees there was evidence offered by the parties in support of their respective positions. Referees made their report to February Term, 1910, making very full findings of fact and holding for conclusions of law:

1. That there had been a failure on part of defendant to deliver material on time, causing damage.

2. That defendant was indebted to plaintiff in the sum of $1,334.90, balance due for the work and damages caused by wrongful delay on part of defendant.

3. There was nothing due defendant on counterclaim.

The court, on the hearing, overruled the defendant's exceptions, in all respects confirmed the report and gave judgment for the amount ascertained to be due, and defendant excepted and appealed.

D. L. Ward and Simmons & Ward for plaintiff.
John L. Bridgers for defendant.

HOKE, J., after stating the case: The issue of indebtedness between these parties is dependent largely upon disputed questions of fact, and these having been resolved against defendant by the referees and on relevant testimony, and their findings having been affirmed by the trial court, there is very little left for our consideration. It has been uniformly held, with us, that in actions of this character "The findings of fact by a referee, supported by evidence and sustained by the trial court, are not reversible." *Malloy v. Lincoln Mills*, 132 N. C., 432; *Lambertson v. Vann*, 134 N. C., 108. And we are of opinion that the exceptions to the conclusions of law were properly overruled.

Objection was made, first, to the conclusion on the part of the referees, that there had been a wrongful delay on the part of defendant in the delivery of material, causing damage. This position predicated chiefly on the finding of fact No. 9, as follows: "That the plaintiff was at all times ready, able, and willing to perform the work in accordance with the terms of the contract, but was prevented from performing the same as required by the contract on account of the defendant's failure to furnish the material as agreed and on account of the defendant's delivering part of the material on the opposite side of a slough from the trestle or in a slough at such point, rendering it necessary for plaintiff to haul said material about one-half a mile to get it to the place of construction. And, taken in connection with the requirement of the contract, "That defendant agreed to deliver all material for the trestle on cars or on the ground and within 300 feet of the trestle, and same is to be furnished in such a manner and time as not to impede said Brown in the performance of his part of the contract," the ruling is clearly correct. In support of the finding, there was evidence on the part of plaintiff tending to show that a lot of heavy material was dumped on the ground about 300 feet from the trestle, in a direct line, but across a slough, which necessitated an additional haul of half a mile on part of plaintiff, causing delay and extra expense. There was no sufficient or satisfactory explanation offered as to the unloading of the material at such an inconvenient place. It is a principle well understood that in the interpretation of a deed or contract the intent of the parties, as embodied in the entire instrument, must prevail, "and each and every part must be given effect if it can be done by any fair and reasonable intendment. . . ." *Davis v. Frazier,* 150 N. C., 447. And in a contract of this character and extent, requiring completion by a specified time, and containing, in connection with the provision for delivery within 300 feet, the further stipulation that the material was to be furnished in such a manner as not to impede the work, it was clearly contemplated and agreed that the material should be delivered within 300 feet of the work and at a point from which a haul could be made to the best advantage, having reasonable regard to the nature of the ground and the attendant facts and conditions. We think, therefore, that defendant was not justified in unloading the material just across a slough, causing the additional haul that plaintiff was forced to make, and the decision to that effect must be upheld.

It was further objected that in the damages assessed against defendant for wrongful delay, there was included an item of $75 charged as a rental at $2.50 per day for a floating pile driver belonging to plaintiff and kept idle for a period of 30 days, the exception being that, according to our decisions, the correct measure of damages was the interest on the value of the machine, which would have amounted, at most, to about $13, defendant referring more especially to the case of *Rocky Mount Mills v. R. R.,* 119 N. C., 693, in support of the position. That was a case in which the machinery and entire equipment for a cotton mill in process of construction was shipped to the address of the manufacturing company at Rocky Mount and over a fast freight through line, established by a number of carriers, associating themselves together for the purpose, at a higher freight rate, of assuring to the shipper a quicker and more reliable delivery of freight than by the ordinary methods of shipment. On negligent delay shown, the correct measure of damages was held to be the interest on the capital invested for the time of the delay, wages paid to workmen, and certain other costs and expenses incident to the breach of contract. In a subsequent case of *Furniture Co. v. Express Co.,* 148 N. C., 87, the Court in affirming the principle applied in *Rocky Mount Mills v. R. R., supra,* and in reference thereto, said: "The decisions of this State are to the effect that the current profits of a going manufacturing enterprise, which are dependent on the varying cost of labor and material and the fluctuations of the market value of the product, as a general rule, are too uncertain to form the basis of an award of damages in breaches of contract affecting the operation of the plant, and the better rule in such cases, when it appears that substantial damages are recoverable, is that such damages shall be ascertained on the basis of interest on the capital invested which is unproductive for the time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed, and some other incidental expenses reasonably referable to the defendant's wrong, which may at times include an outlay in the reasonable effort to reduce or minimize the loss. No doubt there are cases where the average rental value of a business building or a given machine may afford data for a correct admeasurement of damages, but in plants of the kind indicated this rental value is so connected with or dependent upon the fluctuation of the markets that it has been considered with us as the safer rule in enterprises of the kind stated to adopt the interest on the capital invested and unproductive for the time, with other incidental costs, as the correct method of adjustment." Citing *Lumber Co. v. Iron Works,* 130 N. C., 584; *Sharpe v. R. R.,* 130 N. C., 613; *Rocky Mount Mills v. R. R.,* 119 N. C., 693; *Foard v. R. R.,* 53 N. C., 235; *Boyle v. Reeder,* 23 N. C., 607. It will be noted in this statement of the principle the current profits of such an enterprise, and even the rents, dependent as they naturally would be to a great extent on the current profits, are rejected as the proper basis, for the reason that they are too variable and indefinite; but decided intimation is also given that in the case of a business building or a given machine the average rental value frequently affords a more satisfactory estimate as to the amount of damages. Subject to the rule that the damages must have been in the reasonable contemplation of the parties and capable of ascertainment with a reasonable degree of certainty, the purpose is always to make good the loss to the injured party, and when a building or given machine is shown to have a definite rental value, and opportunity for obtaining same is lost by another's breach of contract, the rental value for the time usually affords a better basis for the ascertainment and award of damages, and is a rule which has been not infrequently approved by the courts. *Dodds v. Hakes,* 114 N. Y., 260; *Benton v. Fay Co.,* 64 Ill., 417; Hale on Damages, p. 74.

There was evidence on the part of plaintiff tending to show that the floating pile driver, in question, was an implement belonging to plaintiff, which could be and was not infrequently rented for a definite sum; that opportunity was presented to rent the machine in other work, and that the time lost in its use was about 60 days, and a reasonable rental value for same was $10 per day. There was a finding of fact in accordance with the testimony, except that the time lost was fixed by the referees at 30 days and the net rental at $2.50 per day. On this finding we think the court below, approving the conclusions of the referees, correctly held that the rental value of the machine for the time the rent of same was lost afforded the correct basis for estimate, and that there is no error which gives defendant any just ground of complaint. The judgment will therefore be

Affirmed.

J. D. WILLIAMS AND WIFE *v.* ELM CITY LUMBER COMPANY.

(Filed 15 March, 1911.)

1. **Timber Deeds—Wrongful Cutting—Under Size—Prospective Value—Damage to Land.**

   In an action against the grantee in a timber deed for damages alleged as arising from cutting timber less than the size specified in the deed, the plaintiff cannot recover the prospective value of the trees, but the jury may consider their value in determining the injury to the land, the measure of damages being the decrease in the value of the land by reason of the cutting, or the difference in the value before and after the cutting.

2. **Same—Questions—Evidence—Record.**

   While the court does not commend the questions asked in this case to ascertain the damages to the land by reason of the grantee in a timber deed cutting timber less than the size allowed by the deed, they are considered in connection with the other parts of the record, especially the judge's charge, and no reversible error is found.

3. **Timber Deeds—Wrongful Cutting—Under Size—Damages to Land—Measure.**

   In an action against the grantees in a timber deed for damages to the land by cutting timber of less dimension than specified, and too small to have a market value as merchantable timber: *Held*, competent for the jury to consider the species of the trees, whether of rapid or slow growth, or whether it would be merchantable when it attained its size, the nature and drainage of the soil, the facilities for marketing, and any other relevant facts to enable them to determine its value at the time of the cutting, and the effect of the cutting on the value of the land. *Whitfield v. Mfg. Co.*, 152 N. C., 214, and like cases cited and distinguished, where the trees were "timber trees."

4. **Same—Defense—Probable Growth.**

A timber deed conveyed for value "all the pine timber that is now or may be standing, etc., during the term of this lease (five years), 15 inches in diameter at a point 2 feet above the ground"; and provided that the timber should not be cut over more than one time. In an action for damages begun after the lapse of five years, for damages to the land for cutting timber less than the specified size: *Held*, the defense was not available that the trees cut would have attained the specified size during the term of five years.

APPEAL by defendant from *Ward, J.*, at October Term, 1910, of CRAVEN.

The facts are stated in the opinion of the Court by *Mr. Justice Allen.*

Moore & Dunn for plaintiff.
Guion & Guion for defendant.

ALLEN, J. It is admitted that the plaintiff, Laura E. Williams, is the owner of the land described in the complaint, and that on 20 March, 1903, she conveyed to the defendant for value "all the pine timber that is now or may be standing, lying, or growing thereon, during the term of this lease (five years), 15 inches in diameter at a point 2 feet above the ground." It was also provided in said conveyance that the timber should not be cut over more than one time. The plaintiff alleges that the defendant, while exercising its rights under said conveyance, cut timber less in size than that conveyed, and destroyed undergrowth on the land to her damage $5,000. This was denied by defendant in its answer, but at the trial it was admitted that some trees under size were cut.

There are fourteen exceptions in the record, but all of them are dependent on the determination of two questions:

1. There are several exceptions to evidence and to refusal to give instructions, which involve the competency of evidence as to the prospective value of small trees cut on the land and the right to consider such evidence in estimating the damage. One witness testified that he estimated the value of the timber cut under size at $4,000, and that in reaching this conclusion he considered the value of the timber if left there up to this time. Another answered the question, "What would have been its value if it had had its ordinary growth?" "The lumbermen say 6 per cent interest on their investment what they paid; taking that in consideration, I should think the growth would be about making it about 10 per cent for the whole." Another:

"Q. That small timber has a greater value to the owner of the land in its future growth than it has as timber trees? A. Older timber only has a timber value.

"Q. Ten and fifteen inch stuff has a greater value in its growth to the land than it has as to timber value? A. In its growth."

Another:

"Q. As a man owning young timber, you value your young timber more than at stumpage value? A. No, sir.

"Q. It has an intrinsic value in its prospective growth? A. Yes, sir."

We do not commend the form of these questions, but when the answers are read in connection with the other parts of the record, and particularly with the charge of his Honor, we do not think there is error. The evidence was directed to the growth of the trees and their increased value by growth as a fact to be taken into consideration in fixing the value of the trees when cut, and his Honor so limited it in his charge. He said: "The court charges you that the measure of damages is the value of the trees which were unlawfully cut, with the incidental damages therefrom to the undergrowth. Now, you will have to get at that from the facts and circumstances of the case, and find what the trees would be worth, not necessarily confined to board measure, but you can consider the evidence as to the value of the trees as piling, and all evidence that tends to show whether they would grow, or whether they would not, and, if they would grow, how much will they grow. The figures and estimates have been given you by the witnesses; you will remember what they were."

The plaintiff was not entitled to recover the prospective value of the trees, but the jury could consider this value in determining the injury to the land.

It would be competent for the jury to consider the species of the trees, whether of rapid or slow growth, whether it would be merchantable when it attained its size, the nature of the soil, whether drained or not, nearness to or remoteness from market, the difficulties of marketing, and any other relevant facts to enable them to determine its value at the time of cutting and the effect of cutting on the value of the land.

We not only do not think the defendant suffered any injustice by the admission of the evidence and the refusal to give the instructions requested, but we are of the opinion that the rule for the measure of damage adopted by his Honor was more favorable to the defendant than it was entitled to.

As to ornamental or fruit trees, the authorities are practically unanimous that the measure of damage is the difference in the value of the land before and after cutting; but as to other trees, there is much diversity of opinion. In a note to *R. R. v. Beeler,* 15 Am. and Eng. Ann. Cases, 916, the authorities from Canada, the Supreme Court of the United States, and from the highest courts of all the States are collected, numbering more than two hundred, and from an examination of these it appears that the decided weight of authority is in favor of the rule that the measure of damage is the decrease in the value of the land by reason of the cutting, or the difference in the value of the land before and after cutting, although there are many cases in favor of the rule that the measure of damage is the value of the trees on the land after they have been severed. We think this conflict of authority probably had its origin in the different forms of action at common law, and to the distinctions between the actions of trover and conversion, trespass *de bonis asportatis* and trespass *quære clausum fregit.* If one entered upon the land of another and cut trees thereon, the owner of the land and of the trees had his election at common law to sue in trover and conversion or in trespass *de bonis asportatis* for the value of the trees, or in trespass *quære clausum fregit* for injury to the freehold, the land, or to the possession of it.

In the case of merchantable timber, trees having a market value, the recovery would ordinarily be the same under either rule; but the contention of the defendant, if sustained, when applied to trees too small to have a market value, would work a great injustice.

Suppose the owner of a tract of land has 50 acres covered with scrub oak or blackjack, and by the side of it 50 acres in young pine, all 4 inches in diameter, and the trees on both pieces of land are cut by a trespasser. The blackjack would be more valuable than the pine at the time of cutting, as neither could be converted into lumber on account of size; but if allowed to stand on the land, at the end of fifteen years the increase in the value of the blackjack would be very little, while the pine would be valuable as timber.

We adopt as the measure of damage, when trees are cut on the land of another, large or small, the rule stated by *Chief Justice Clark* in *Brickell v. Mfg. Co.,* 147 N. C., 119: "The measure of damages was the difference in the value of the land before and after the injury complained of," such difference to be ascertained as of the time of the injury.

The same rule prevails with reference to ponding water, *Parker v. R. R.,* 119 N. C., 677; to laying sewers, *Myers v. Charlotte,* 146 N. C., 246; and is sustained in the following cases: *Davis v. Miller,* 151 Ala., 580; *Chipman v. Hibberd,* 6 Col., 162; *R. R. v. Harrington,* 128 Ga., 438; *Chicago v. Brown,* 157 Ind., 544; *Greenfield v. R. R.,* 83 Ia., 270; *R. R. v. Haynes,* 1 Kan. App., 586; *Thompson v. Moiles,* 46 Mich., 42; *Corner v. Chicago,* 43 Minn., 375; *Shannon v. Hannibal,* 54 Mo. App., 223; *Dent v. R. R.,* 61 S. C., 329, and *Nelson v. Churchill,* 117 Wis., 10. We are not inadvertent to the cases in our Reports in which it is said that the measure of damages is the value of the trees on the land after they have been severed, with incidental damage caused in their removal. *Bennett v. Thompson,* 35 N. C., 147; *Gaskins v. Davis,* 115 N. C., 89; *Davis v. Wall,* 142 N. C., 451, and *Whitfield v. Mfg. Co.,* 152 N. C., 214. In each of these cases the trees cut were spoken of as "timber trees," and no special damage to the land was shown, and as we have seen, in such case the amount of recovery would be practically the same.

2. The other exceptions relate to the construction of the clause in the deed as to the size of the timber the defendant was entitled to cut, the defendant contending that the plaintiff was not entitled to recover damages for trees cut that would attain 15 inches in diameter during the term of five years.

At the time this action was begun, five years had elapsed, and it was provided in the deeds that the defendant could only cut over the land one time. When the shortness of the term, the fact that the defendant was expressly limited to one cutting, and the other parts of the deed are considered, we think his Honor correctly charged the jury that the defendant had no right to cut trees under 15 inches.

We find no error, and the judgment is

Affirmed.

I. H. KEARNEY, ADMINISTRATOR, *v.* S. C. VANN AND ARRINGTON ET AL.

(Filed 15 March, 1911.)

1. Interpretation of Statutes—Intent.

Statutes should be interpreted to effect the intent of the Legislature, and enforced without reference to particular cases presenting a hardship.

2. Same—Words Employed.

In interpreting a statute the intent is to be first sought in the meaning of the words used, and when they are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instruments, no other means of interpretation should be resorted to.

3. Interpretation of Statutes—Intent—Common Law—Relative Acts.

Statutes are to be construed with reference to the common law in existence at the time of their enactment, and in connection with other statutes which relate to the same subject-matter.

4. Interpretation of Statutes—Intent—Object—Defects—Evil—Remedy.

Every statute must be construed with reference to the object to be accomplished by it; and in order to ascertain this object, it is proper to consider the occasion for its enactment, the effects or evils of the former law, and the remedy provided by the new one.

5. Interpretation of Statutes—Common Law—Relevant Acts—Implication—Married Women—Separate Realty—Husband and Wife—Work Done.

At the time of the enactment of the statute making Revisal, sec. 2016, applicable to the property of married women, the common law declared that improvements placed on the lands of a married woman by her husband were intended for a gift; and Revisal, sec. 2107, provided that no contract between them "should be valid unless such contract was in writing and proved as required for conveyances at law, and unless it appeared to the officer taking her private examination that the contract was not unreasonable and not injurious to her, etc.: *Held*, the law does not repeal an older statute by implication, and that the statute giving a lien on the property of a married woman for work done on her land, amending section 2016, Revisal, does not include a lien on the wife's land filed by her husband for work done, etc.; and that the husband having no lien, his heirs can acquire none after his death.

6. Same—Contracts.

The purpose of Revisal, sec. 2107, was to protect a married woman from the influence and control which the husband is presumed to have over her by reason of the marital relation, by an adjudication of the probate officer as to her interests; and the requirements imposed by this section are not dispensed with under the provisions of Revisal, sec. 2016, giving a lien on her lands for labor done, etc., when the lienor is her husband, though it is otherwise as to her written consent in dealing with a stranger, under Revisal, sec. 2094.

7. Married Women—Separate Realty—Husband and Wife—Work Done—Liens—Equity.

Equity will not interfere to give a husband a lien on his wife's land for work done, etc., by reason of the consequent improved value of the wife's land.

. Married Women—Separate Realty—Husband and Wife—Contracts Between—Notes.

The fact that a wife executed a note to her husband for work, etc., done by him on her land, does not affect the question of a lien filed by the husband therefor, as the presumption is that the wife executed the note under the direction of the husband.

CLARK, C. J., dissenting.

APPEAL from *Ward, J.*, at January Term, 1911, of FRANKLIN.

The plaintiff, administrator of Annie Fuller, commenced this proceeding to sell land for assets to pay debts. The only claim in dispute was one in favor of the administrator of Mark Fuller, husband of Annie M. Fuller, for $700, for building a house on his wife's land. The only evidence introduced at the trial was the following:

I. H. Kearney, witness for plaintiff, testified as follows: "I am the administrator of Annie M. Fuller, deceased. I was well acquainted with Annie M. Fuller and her husband, M. A. Fuller. I know the lot in the town of Franklinton owned by Annie M. Fuller described in the petition in this cause. The purchase price of the lot was $150, and the deed was made to Annie M. Fuller. It is situated only a few hundred yards from my place. I know that M. A. Fuller built a home on it after it was bought. He was several years completing the house. I sold him the timber and material for the house and he paid me for it. He did the labor himself. I do not remember the exact date when it was completed, but I know it was the year she died, and within less than one year prior to the filing of the lien. I know this because I remember when the lien was filed, and that it was within twelve months from the completion of the house. I calculated the time, and while I cannot remember the exact dates, I did know them, and know that it was within one year of the completion of the work. I think the painting of the house and putting on the locks and probably some inside work was the last work done upon it. Mark Fuller paid for it all; his wife had no source of income. Just before she died she was contemplating going North to teach school to get some money to pay on the building." The witness here was shown a paper-writing (Exhibit "A"), and testifies that he knows the handwriting of Annie M. Fuller, and that the paper shown him and the signature to it are in her handwriting, and that it was exhibited to him by M. A. Fuller. The execution of the note is admitted by the defendants, and it is offered in evidence. Note is as follows:

$700. FRANKLINTON, N. C., October 4, 1907.

One day after date I promise to pay to Mark A. Fuller or order seven hundred dollars, with interest from date at six per cent per annum; this note given for building house and improvements done on my property.

(Signed) ANNIE M. FULLER. (SEAL.)

A notice of lien was filed by the husband for work done and materials furnished during the years 1903-4-5-6-7 and 1908. His Honor held against the validity of the claim and denied the right to enforce a lien, and the plaintiff appealed.

W. H. Yarborough and N. Y. Gulley for plaintiff.
William H. Ruffin and Jacob Battle for Fuller heirs.

ALLEN, J., after stating the case: This is the first time the question has been presented to this Court of the right of the husband to subject the real estate of the wife to a lien for "work and labor done and materials furnished." This right is claimed under the last clause of section 2016 of the Revisal, which section reads as follows:

"2016. Every building built, rebuilt, repaired, or improved, together with the necessary lots on which such building may be situated, and every lot, farm, or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or materials furnished. This section shall apply to the property of married women when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such case she shall be deemed to have contracted for such improvements."

This statute was held to be valid as to the contracts of married women with strangers, in *Finger v. Hunter,* 130 N. C., 529, which is approved in *Ball v. Paquin,* 140 N. C., 95, and we do not doubt the power of the Legislature to include contracts between husband and wife.

The inquiry here is, Has it done so?

The object of all interpretation of statutes is to ascertain the meaning and intention of the Legislature, and to enforce it. The courts are not bound by the letter of the law, which has been denominated its "body," but may consider its spirit, which has been called its "soul." Nor can the courts, when the intention is once discovered, refuse to enforce it because the facts of some particular case present a seeming hardship.

This case is between the administrator of the husband and the collateral relations of the wife, but the statute must be construed as between the husband and the wife, because if the husband could not enforce the lien against his wife, his administrator, who can have no greater right, cannot do so against her heirs.

"In the construction, both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words employed, and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation." Black Inter. Laws, 37.

The language under consideration is: "This section shall apply to the property of married women when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such case she shall be deemed to have contracted for such improvement."

We do not think this was intended to embrace contracts with the husband. If it does, the husband and wife may be living together, and the husband may propose to build a house on her land, and if she consents for him to do so, he can have a lien, or if she asks him to build a house on a vacant lot belonging to her and he does so, the same result follows. In the one case she has "consented" and in the other has "procured" the building to be built on her land.

This construction is not in accordance with the relationship existing between husband and wife, as recognized by law, and would convert every gift of money used in improving her property into a liability. The presumption of law arising from the relationship of the parties is that improvements placed on the land of the wife by the husband are a gift. *Arrington v. Arrington,* 114 N. C., 119. This view is further strengthened by the language, "she shall be deemed to have contracted for such improvements." The Legislature inserted this language because of the decisions of this Court, "that there must be a debt due from the owner of the property before there can be a lien." *Baker v. Robbins,* 119 N. C., 289; *Weathers v. Borders,* 124 N. C., 610; and in order to sustain the position of the plaintiff it must be held, not only that the husband has a lien, but that the relation of creditor and debtor exists between him and his wife.

When the language is of doubtful meaning, the courts may inquire as to the evils to be remedied.

The part of the section being considered was adopted by the Legislature in 1901 as an amendment to the original act, and prior to its enactment no case had been presented to this Court in which a wife had employed a husband to erect a building on her land, and in which, upon refusal on her part to pay, he had asked the courts to enforce a lien in his favor; but several cases had been considered involving the rights of strangers, in which it had been held that a lien could not be enforced against a married woman, although the improvements were made with her knowledge and consent and her property was enhanced in value. *Weir v. Page,* 109 N. C., 220; *Thompson v. Taylor,* 110 N. C., 70; *Weathers v. Borders,* 124 N. C., 610.

Is it not reasonable to conclude that the Legislature had in mind the law as declared in these cases, and, recognizing its injustice, was trying to remedy this evil, instead of having in contemplation that a case might arise of a husband who would build on his wife's land, with her consent, and then seek to sell her land to reimburse himself?

"Every statute must be construed with reference to the object to be accomplished by it. In order to ascertain this object, it is proper to consider the occasion and necessity for its enactment, the defects or evils in the former law, and the remedy provided by the new one." Cyc., vol. 36, 1110.

Again, statutes are to be construed with reference to the common law in existence at the time of their enactment, and in connection with other statutes which relate to the same subject-matter.

"Later statutes are considered as supplementary or complementary to the earlier enactments. In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design. . . . In the passage of each act, the legislative body must be supposed to have had in mind and in contemplation the existing legislation on the same subject, and to have shaped its new enactment with reference thereto. . . . To illustrate further, all the statutes of the same State, relating to the property rights and contracts of married women, removing their common-law disabilities, authorizing them to manage their separate estates, to engage in business, etc., are to be read and construed together as constituting one system." Black Inter. Laws, p. 204.

At the time this statute was enacted the common law declaring that improvements placed on the land of the wife by the husband were presumed to be a gift, and section 2107 of the Revisal, providing that no contract between husband and wife affecting or charging any part of her real estate, should be valid unless such contract was in writing and proved as required for conveyances at law, and unless it appeared to the officer taking her private examination that the contract was not unreasonable and not injurious to her, and that these facts should appear in the probate, were in force.

This presumption of law and this statute must be inoperative as applied to this case, if the contention of the plaintiff can be sustained. "The law does not favor the repeal of an older statute by mere implication. The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts, the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it." *Winslow v. Morton,* 118 N. C., 491.

The case of *White v. Wayne,* 25 N. Y., 332, is similar to this. The Legislature of New York passed an act authorizing married women to devise or convey their real and personal property as if they were unmarried, and it was contended that this enabled the wife to convey to her husband. The Court says with reference to this contention: "Taking away that disability (the disability of married women to convey), she would have power to make all such conveyances as were not forbidden by special provisions of law; but such general statutes are never understood to overreach particular prohibitions, founded on special reasons of policy or convenience," and it was held that the deed was not valid.

In *Kneil v. Egleston,* 140 Mass., 202, it was held that the husband could not make a valid contract with his wife under a general statute allowing her to contract as a *feme sole.* To the same effect is *McCorkle v. Goldsmith,* 60 Mo., 479. The reasoning applies with great force to a statute guarding with such care the rights of the wife, and requiring a judicial investigation before she is made liable.

In *Thompson v. Thompson,* 218 U. S., 611, the wife sued the husband for damages for an assault, claiming the right to do so under a statute of the District of Columbia giving the right to married women to sue "for torts committed against them as if they were unmarried." The Court held that such an action could not be maintained at common law nor under the statute. *Mr. Justice Day,* speaking for the Court, says: "It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the Legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property, as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.

"We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration."

It is said, however, that if any effect is given to the statute, it must dispense with the written consent of the husband as to contracts made by her with a stranger as is required by section 2094 of the Revisal, and that there is the same reason for saying that section 2107 does not apply.

We do not think the same reason exists. The statute requiring the written consent of the husband when dealing with a stranger was to protect her against an improvident contract, and there was no such relationship between her and the stranger as raised a presumption of undue influence and fraud, while the statute regulating contracts between husband and wife was "to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation." *Sims v. Ray,* 96 N. C., 89. The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption and render the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify, and we do not think it was the purpose of the Legislature to abrogate these requirements.

We conclude, therefore, that the plaintiff is not entitled to a lien under the statute, and it is decided in *Weir v. Page,* 109 N. C., 223, that a charge cannot be established under principles of equity. In that case a stranger built a house on the land of a married woman, and in answer to the contention that equity would aid him, the Court says: "But counsel for the plaintiff says the defendant's property has been greatly enhanced in value by the work and labor done and the materials furnished, and that she enjoys the benefits of this increased value at the expense of the plaintiff, and upon broad principles of equity, *ex equo et bono,* he is entitled to compensation and ought to be paid by the defendant, who enjoys the benefit of the increased value. The only answer to this—and so far as this Court is concerned or has power, it is conclusive—is that the law to which reference has been made clearly and explicitly declares otherwise, unless the work and labor had been done and the materials furnished under a contract allowed by law. It is the duty of this Court to construe and declare the law, and it is not within its province to make or alter it."

The facts of this particular case cannot change the construction of the statute, but when considered they do not rebut the presumption of a gift. It is true, the plaintiff introduced a note signed by the wife in October, 1907, about four years after the work was begun and when it was near completion, but the presumption of law is that this note was executed under the influence of the husband, and there was no evidence to the contrary.

No error.

CLARK, C. J., dissenting: In *Weir v. Page,* 109 N. C., 224, *Davis, J.,* referring to the fact that "the Constitution of North Carolina secures to every married woman the sole and separate estate in her real and personal property, independent of her husband, as if she were a *feme sole,*" commented upon the state of the law, as construed by the courts, which exempted her property from lien for work and labor done and material furnished thereon, and suggested, speaking for the full Court, that her liabilities in dealing with her separate estate should be made commensurate with her rights, and that "such alterations in the law would prevent much injustice and many frauds." The Legislature of 1901, ch. 617, enacted what is now the last paragraph of Revisal, 2016, as follows: "This section shall apply to the property of married women when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such case she shall be deemed to have contracted for such improvements."

This statute does not contain any provision "except when the building or improvement shall have been put thereon by the husband." The Legislature did not see fit to insert such provision, and the Court has no authority to amend the statute by inserting it. It was a sage remark of *Mr. Justice Daniel,* "The Court should not be wiser than the law."

The Legislature knew enough to insert the exception if it had seen fit, for in the recent statute, ratified 6 March, 1911, the General Assembly enacted, "Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried," adding the exception that it should not apply to contracts between a wife and her husband. Revisal, 1907. The reason why the exception was incorporated in the last statute, and not in the former, is that Revisal, 1907, applies to contracts between the husband and wife affecting her estate generally where the transaction may be in secret; whereas Revisal, 2016, applies to betterments put upon her real estate in a public manner, where it still must be proven, to secure the lien, that they were placed on the land with the wife's consent or procurement.

Argument can be made why the Legislature of 1901 should have excepted improvements placed by the husband upon the wife's land. Such argument must necessarily rest upon the basis of the now obsolete conception of a wife, derived from more barbarous times, that she is a chattel belonging to her husband, and that hence, though a single woman is competent to control her property and make contracts, she loses her ability to do so upon becoming married, and only regains it when she becomes a widow.

The Constitution and laws of this and all other civilized States have abandoned that conception of a married woman, and she is now held as a *feme sole* in relation to her property and contract rights except where expressly restricted by some antiquated and unrepealed statute.

The argument on the other side is that if the wife's property is not liable for betterments placed on it by her husband, when it is proven that it was done with her consent and procurement, manifest injustice will often be done. In this very case the effect of denying this lien is that the wife and husband both being dead without leaving children, his next of kin lose $700 which he had placed on this property with her consent and procurement and for which she gave a written acknowledgment to him, and that her next of kin obtained the $700 which she admitted in writing belonged to her husband.

But the overwhelming consideration in the whole matter is that the Legislature did not write into the statute of 1901, now Revisal, 2016, any such exception, and that the courts have no right to amend the statute to conform to what they may think the Legislature ought to have done.

Writing provisions into a statute which the Legislature has not inserted is not only objectionable because it is beyond the just powers of the courts, but "judicial legislation" is necessarily retroactive and unjust, because it makes that to be the law which was not the law at the time the act was done. Had this exception been placed in the act of 1901 by the Legislature, and not by the courts now, the parties would doubtless have acted in conformity to it. Its insertion now destroys the clear understanding between the husband and wife (as evidenced by the $700 note), is contrary to elementary justice, and not authorized by the statute. The courts should strictly observe the maxim, *"Ne sutor ultra crepidam,"* and not trench upon the province of the lawmaking department of the Government.

The Code, 1781, now Revisal, 2016, gave a lien on "every" building built, repaired, or improved, for work done or material furnished. It contained no exception whatever. Nevertheless, the Court saw fit to write into it an exception in favor of married women. That proved so inequitable that the Legislature added chapter 617, Laws 1901, now the second clause of Revisal, 2016. Now the Court is again asked to amend by writing another exception into the statute, excepting repairs furnished by a husband. In *S. v. Fulton,* 149 N. C., 485, where the word "every" was used, the Court refused to amend by writing into the statute the words "except a husband," as is asked in this case, even though that was a criminal statute, to be construed strictly, and though to make such refusal the Court had to overrule the previous decision to the contrary in *S. v. Edens,* 85 N. C., 522. The words in this statute, "shall be deemed to have contracted," simply conform to the meaning of Revisal, 2016, as to every one, by giving a lien upon an implied contract, a proceeding *in rem,* a lien upon the property for the betterment, and not creating a debt against the owner upon an express contract, unless that is shown outside of the lien.

The note for $700 is not a debt against the estate of the wife, because of noncompliance with the requirements of Revisal, 1907. But it is sufficient, together with the other evidence, to make it a lien upon the property upon which the building was placed, for all has been done that is required by Revisal, 2016.

A. R. WALTERS, BY NEXT FRIEND, *v.* ROCKY MOUNT SASH AND BLIND COMPANY.

(Filed 15 March, 1911.)

1. **Master and Servant—Instructions to Servant—Inexperienced Servant—Dangerous Machinery—Questions for Jury.**

   If an employee is instructed by the master to do a dangerous act without warning against danger, he having had no experience in doing the act, the question of negligence is for the jury.

2. **Same—Dangerous Machines—Repair—Obvious Danger—Rule of the Prudent Man—Contributory Negligence—Questions for Jury.**

   The plaintiff, an employee 19 years of age, was changed, under his protest, from working at a harmless machine to a dangerous one, the latter machine being badly out of repair and containing revolving knives run by machinery. The plaintiff showed his superior that the result of the work upon the machine was unsatisfactory, and was instructed to do the best he could; also, to "get a monkey-wrench and see if he could raise the bed back to its proper place." The bed having slipped down, left the revolving knives exposed, and while the plaintiff was endeavoring to raise the bed with a worn monkey-wrench, the wrench slipped from a nut he was working on, and his fingers were cut off by the revolving knives: *Held,* (1) it was negligence for the master not to have instructed the servant in the operation of the dangerous machine; and in ordering him to repair it without instructions as to stopping it, etc.; (2) there being no evidence that plaintiff knew of the danger in attempting to repair the machine, the danger was not so obvious that a reasonably prudent man would not have undertaken it, and a judgment of nonsuit was improperly allowed.

APPEAL by plaintiff from *Peebles, J.,* at October Term, 1910, of EDGECOMBE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

H. A. Gilliam, Aycock & Winston, and Woodard & Hassell for plaintiff.

F. S. Spruill for defendant.

CLARK, C. J. The plaintiff, 19 years of age, had been working in the defendant's factory in the sash department. On 4 June, 1909, the foreman transferred him to the moulder, a dangerous machine with revolving knives. The plaintiff objected to going, but the foreman told him that he was short of hands and that a green hand was running the moulder who was tearing it all up. The foreman gave the plaintiff no instructions. The plaintiff undertook to do the work, but found that the machine was "shaking and rattling like the wood was beating down on the bed." The plaintiff carried the piece of wood he was working on to the superintendent, who said it would have to be smoother than that, and to go and do the best he could with it. The plaintiff then showed the material to the machinist, who said he had done all he could to the machine; that it was not any good and ought to be in Tar River. The plaintiff could not make the machine work satisfactorily, shut it off, and tried to locate the trouble. He found that a part of the bed had slipped down. He reported this fact to the foreman, who told him to "Get a wrench and see if you can't raise that bed back to its proper place." Plaintiff was trying to raise the bed, which no one showed him how to do nor told him it was dangerous. He found it was necessary to remove the pressure bar. When he was trying to loosen it, the wrench slipped off the tap, which was worn, and the plaintiff's fingers were cut off by the revolving knives, which were exposed by the bed being dropped down. This was the fourth day the plaintiff had worked on that machine. In that time he had stopped it, he says, perhaps 20 times; that if it had been stopped while he was removing the pressure bar his fingers would not have been cut off; but he further says that he could not remedy the trouble by raising the bed when the machine stopped. He further states that the foreman did not instruct him to stop the machine when at work on it, nor was there any general order to that effect, and he did not see any danger in attempting to adjust the bed while running it; that he could not adjust the machine (as the foreman told him to do) while it was stopped. The instruction of the foreman to him was, "Go back and do the best you can," and that he had never seen anybody work on the machine or undertake to repair it.

This bare summary of the evidence of plaintiff shows error in directing a nonsuit. A green hand, 19 years of age, transferred against his protest to a more dangerous employment, without instruction, the machine being a dangerous one, and so badly out of repair that the machinist declared it ought to be in the river. "If an employee is instructed to do a dangerous act without warning against danger, he having no previous experience in doing the act, the question of negligence is for the jury." *Holton v. Lumber Co.*, 152 N. C., 68.

As was said by *Brown, J.*, in *Shaw v. Mfg. Co.*, 146 N. C., 238, "The trial judge might well have instructed the jury that if they believed the evidence the defendant was guilty of negligence in failing to furnish plaintiff with sufficient appliances reasonably necessary to the accomplishment of the work." The order of the superintendent to the plaintiff to go on with the work and do the best he could with a broken machine was negligence, as was the similar order of the foreman as to the plaintiff repairing the machine. The risk to the plaintiff was not so obviously dangerous that a reasonably prudent man might not have undertaken it. *Noble v. Lumber Co.*, 151 N. C., 76; *Horne v. R. R.*, 153 N. C., 239; *Pressly v. Yarn*

Mills, 138 N. C., 410; *Hicks v. Mfg. Co., ib.,* 326; *Lloyd v. Hanes,* 126 N. C., 359; *Sims v. Lindsay,* 122 N. C., 678. The latter case in its facts is almost identical with the present, the plaintiff in that case having lost her fingers in a mangle in a steam laundry.

The judgment of nonsuit is
Reversed.

JOSEPH LEWIS ET AL. v. G. A. STANCIL.

(Filed 15 March, 1911.)

Wills—Interpretation—Devisee and Children—Tenants in Common.

Under a devise of certain lands to testator's grandson, "to him and his children born in lawful wedlock," the grandson and his children living at the time of the testator's death acquire the fee to the lands as tenants in common in equal portions.

HOKE and BROWN, JJ., dissenting.

APPEAL by defendant from *Ward, J.,* at September Term, 1910, of PITT.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

Jarvis & Blow and Harry Skinner for plaintiffs.
F. G. James & Son and Moore & Long for defendant.

CLARK, C. J. Benjamin Pollard devised the land in question to his grandson, Joseph A. Lewis, in the following language: "I give and devise to my grandson, Joseph A. Lewis, that part of my house tract of land (describing it), to him and his children, born in wedlock, forever."

On the death of Pollard, Lewis entered into possession of the land and subsequently mortgaged the same. It was sold under said mortgage and bought by the defendant, Stancil. At the death of Pollard, Joseph A. Lewis had four children living. His Honor adjudged that under the devise said Lewis and his four children living at the death of his testator took the land in fee as tenants in common, and adjudged that the plaintiffs, being said children and their representatives, were entitled to recover four-fifths interest in said land as tenants in common with the defendant, who was entitled as purchaser from said Joseph A. Lewis to his own one-fifth. The amount of the recovery for the mesne profits was agreed upon, provided the judgment was sustained, that the plaintiffs were entitled to recover four-fifths of the land as above set out, and the sole assignment of error is that the court held that the defendant Stancil was a tenant in common of only one-fifth of said land, and that the plaintiffs were owners of the other four-fifths.

The ruling of his Honor is in conformity with the uniform decisions of this Court. In *Silliman v. Whitaker,* 119 N. C., 92, it was said: "It was settled in *Wild's case,* 6 Rep., 17 (3 Coke, 288), decided 41 Elizabeth, that a devise to B. and his or her children, B. having no children when the testator died, is an estate tail. If he have children at that time, the children take as joint tenants with the parent. This has been uniformly held in England." The late case in the House of Lords, *Clifford v. Koe,* 5 App., 447, was cited, which approved *Wild's case,* opinions being delivered *seriatim* by *Lord Chancellor Selborne, Lord Hatherly, Lord Blackburn,* and *Lord Watson,* who unanimously sustained *Wild's case,* stating that "for these three hundred years it has been the uniform ruling in England."

In *Silliman v. Whitaker, supra,* the Court cited and reviewed numerous North Carolina cases to the same effect. At last term, in *Whitehead v. Weaver,* 153 N. C., 88, the subject was again reviewed, citing *Silliman v. Whitaker,* and adding to the cases therein quoted *Helms v. Austin,* 116 N. C., 752, and *King v. Stokes,* 125 N. C., 514. The present case is stronger than most of those above cited, for here the devise is to Lewis and his lawful children forever, showing that Lewis took his share in fee simple, "forever," and there can be no room to contend that he took a life estate.

The decision of his Honor must be

Affirmed.

HOKE, J., dissenting: I concur in the general propositions of law stated by the Court in this case, but am of opinion that on the language of the will and a perusal of the entire instrument the testator intended his grandson, Joseph Lewis, to take a life estate, with remainder in fee to his children, born in lawful wedlock; and that by correct interpretation this devise should be so construed.

BROWN, J., concurs in this dissent.

HARRIET A. ROBERSON v. GREENLEAF JOHNSON LUMBER COMPANY.

(Filed 15 March, 1911.)

1. **Railroads—Fellow-servants—Logging Roads.**
   The Fellow-servant Act (Revisal, 2646) applies to logging roads using the agency of steam. *Bissell v. Lumber Co.*, 152 N. C., 125, cited and approved.

2. **Carriers of Passengers—Master and Servant—Fellow-servant—Employee.**
   An employee of a railroad who customarily used the trains of the company in going to and from his work is a passenger while so doing.

3. **Railroads—Master and Servant—Employees—Usage—Actionable Negligence—Warning.**
   The plaintiff, an employee of defendant railroad, boarded the defendant's train for the purpose of going home from his work, which had been customary: *Held*, it was actionable negligence for the employees of the train to suddenly start the train forward, without notice or warning, while the plaintiff was getting off at his usual place, and thus causing him to be thrown to the ground to his injury.

4. **Appeal and Error—"Case Settled"—Negligent Killing—Measure of Damages—Net Earnings—Support of Family.**
   In an action for damages for the wrongful killing of plaintiff's intestate, it is not error to refuse an instruction which limited recovery to the net earnings, after deducting the cost the deceased would have incurred in supporting his family depending upon him, the object of the statute being to render compensation

as near as may be for the actual money value of the life by estimating the present cash value of his probable net earnings above the necessary expenses for his own support.

APPEAL by defendant from *Peebles, J.*, at December Term, 1910, of MARTIN.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

H. W. Stubbs for plaintiff.

P. H. C. Cabell and Winston & Matthews for defendant.

CLARK, C. J. Action for wrongful death of plaintiff's intestate, an employee of the defendant company, who had boarded its train, as was his custom, to return home at night from his work. The complaint alleges that on reaching the place where said intestate was accustomed to alight, the said train stopped, and while said intestate was getting off said train the engine was suddenly and carelessly, without notice or warning, jerked forward by the negligent operation of the engine, throwing said intestate violently to the ground so that the cars ran over him, causing his death.

There was evidence to support the above allegation. The Fellow-servant Act (Revisal, 2646) applies to these logging roads. *Bissell v. Lumber Co.*, 152 N. C., 125, and cases there cited. Besides, *pro hac vice,* the plaintiff's intestate was a passenger.

The court having held, upon the motion made in this case, that the appellee's case having been served in time, must be accepted as modifying the appellant's case, practically the only exception left for our consideration is the sixth, which is to the refusal of the court to instruct the jury, as prayed by the defendant, "that the plaintiff can only recover, if at all, the net earnings after deducting all the personal expenses, including what it would cost Roberson to support his family dependent upon him." This was properly refused. The object of the statute is to assess the present value of the prospective net earnings of the deceased after deducting only his reasonably necessary personal expenses. To deduct, further, the support he would have been able to give his family would be to deduct the very loss for which the statute was intended to give compensation. The whole subject is so fully discussed in *Carter v. R. R.,* 139 N. C., 500, and cases there cited, that it is unnecessary to do more than to reiterate what is there said.

In *Carter v. R. R., supra,* it is pertinently said: "The true rule requires the jury to deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of living, business, calling, or profession, etc." It adds that to deduct further, as the defendant there requested, "the amount spent for his family or those dependent upon him, the result would be to deprive the families of a very large majority of men from recovering damages for their death. But a small number of men accumulate estates. Their income or earnings, after paying their actual personal expenses, are expended in the support and education of their children. Certainly, it was not contemplated that for wrongfully causing the death of such a man no damage could be recovered, although his death deprives his family of their sole support, while for the death of one without any family, or who by miserly living and hoarding deprives his family of support and education, large damages should be awarded. It cannot, with any show of truth, be said that in the first case the family sustain no pecuniary loss by reason of the death of the husband and father. Such a construction of the statute would place beyond the protection of the law nine-tenths of the people." This same rule had been previously laid down in *Mendenhall v. R. R.,* 123 N. C., 276; *Poe v. R. R.,* 141 N. C., 528, and cases there cited, and has been approved recently in *Gerringer v. R. R.,* 146 N. C., 35.

The object of the statute is to render compensation as near as may be for the actual money value of the life of the man by estimating the present cash value of his probable net earnings above the necessary expenses for his own support. To do this, we should leave out of consideration whether or not he would probably have accumulated anything out of such net earnings, and, on the other hand, the number of the family dependent upon him.

No error.

SEABOARD AIR LINE RAILWAY COMPANY v. CITY OF WILMINGTON.

(Filed 15 March, 1911.)

Cities and Towns—Streets—Easements—Value—Abutting Owners—Reversion—Contracts—Interpretation of Statutes.

The plaintiff, a railroad, and a terminal company, desirous of connecting their property, entered into an agreement with a city that it should agree to the procurement of a legislative act authorizing the condemnation of a street to effectuate that purpose, the former corporations agreeing to pay the city for the easement and to build certain improvements on their adjoining lands; the act passed according to this agreement, providing that under certain named conditions the street should revert to the city for public purposes. The plaintiff denied the right of the city to compensation for the easement over the street, upon the ground that, as abutting owners, they held the fee therein: *Held*, (1) a city holds the easement in its streets in trust for all its citizens, and was entitled to compensation from the plaintiffs; (2) here it was entitled to compensation under an express agreement relative to the passage of the act; (3) the act itself recognized the value of the easement in the street to the city, and provided for the reversion under named conditions.

APPEAL by plaintiff from *Whedbee, J.*, at December Term, 1910, of NEW HANOVER.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

J. D. Bellamy for plaintiff.

W. M. Bellamy for defendant North Carolina Terminal Company.

Herbert McClammy for defendant City of Wilmington.

CLARK, C. J. This is a proceeding under chapter 39, Pr. Laws 1909, to condemn the western end of Brunswick Street in Wilmington, where it touches upon the Cape Fear River. The plaintiff and the terminal company, one of the defendants, deemed that it would be beneficial to condemn this western end, 175 feet in length, of the street which lay between them, in order to connect their property, and entered into an agreement with the city of Wilmington by which it consented that an act should be passed permitting the condemnation of the street. It was specified in this agreement that the city of Wilmington should be paid for its rights in the street whatever the commissioners in the condemnation proceedings should find to be a just value. In consideration of such compensation and the inducement that the plaintiff agreed to build warehouses, enlarge its terminal facilities, and make other improvements, requiring considerable expenditure of money, upon the premises to be so condemned, the city consented to the passage of the act.

In the condemnation proceedings the value of that part of the street which was so condemned, 66 feet wide and 175 feet long, was assessed at $12,000. The interest of the terminal company therein was assessed at $3,000 and the interest of the plaintiff at $3,000, and the value of the city's interest was assessed at $6,000. Judgment was entered upon the award and the plaintiff and the said terminal company excepted and appealed, upon the ground that upon the condemnation of the street the ownership of the soil therein reverted to the abutting proprietors, said terminal company and the plaintiff, and that therefore the city had no interest therein for which damages could be assessed. As this Court said in *Spilman v. Navigation Co.,* 74 N. C., 675, in reference to an argument therein presented, this proposition presents "an amusing fallacy which is worth preserving." *Roberts v. Baldwin,* 151 N. C., 409.

It sometimes happens that a city owns the fee simple in the streets which it retains when that part of the town is laid off, as is the case with the city of Raleigh, where the State holds the streets in fee in trust for the city. It does not appear that the city of Wilmington does not own the fee simple in Brunswick Street at this point. But if it were otherwise, it certainly owned an easement therein in trust for all the people of the city, and when that easement, by authority of the General Assembly, is condemned and taken away, it is entitled to compensation for its assessed value (unless the act provides otherwise) as much so as the adjacent proprietors have a right to have the value of their reversion assessed. Indeed, here by express agreement the city consented to the passage of the act upon condition that it should be paid the value of its easement in said street.

It is admitted that if the city is entitled to anything at all, it is entitled to the sum of $6,000, which has been assessed as the value of its easement in the street. The proposition of the two adjacent corporations, who have cast longing eyes upon the land occupied by the broad street between them which they wish to appropriate for their own uses, is that if they appropriate the same by condemnation proceedings they shall simply take it for division between themselves, leaving the city without compensation for the loss of its easement. Yet without the consent of the city it cannot be conceived that the Legislature would have authorized the taking of the street for private ownership, nor that the city would have consented to the passage of the act without compensation being therein provided for the loss of the use of the street by its citizens.

Indeed, the statute provides that if the plaintiff shall not within six months begin the enlargement of its terminal facilities the land condemned under this act shall "revert to the city for public purposes . . . upon return to said railway of the amount of money paid by it or them (its receivers) under the condemnation proceedings." This clearly contemplates payment by the plaintiff to the city for the value of its easement in the street, to be assessed in such condemnation proceedings.

Affirmed.

NORFOLK SOUTHERN RAILWAY COMPANY v. WASHINGTON COUNTY ET AL.

(Filed 15 March, 1911.)

1. Counties—Boundary Line—Location—Legislative Powers.

The location of the true boundary line between counties raises a political question, and the power is vested in the Legislature to determine a disputed line.

2. **Same—Intent—Interpretation of Statutes—Contracts — Constitutional Law.**

   A legislative act reciting that a boundary line between two counties is "indefinite and uncertain," declaring its purpose to establish the line and proceeding then to define and describe the line, clearly indicates the intent to declare and establish what it deems the true boundary line; and the line so established must be taken as the true line without question of its historical correctness; and the questions of private rights and impairments of contracts are not involved.

3. **Counties—Boundary Line—Location—Legislative Powers—Courts.**

   Since the institution of this action to apportion to Washington and Tyrrell counties taxes on a railroad bridge over Albemarle Sound from one county to the other, a legislative enactment declaring the line to be in the middle of the sound is held as controlling the question.

APPEAL by defendants from *Justice, J.,* heard at chambers at Elizabeth City, 19 January, 1911. From CHOWAN.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

W. M. Bond for plaintiff.
Pruden & Pruden for Chowan County and Sheriff.
Ward & Grimes for Washington County.

CLARK, C. J. This was an action brought by the Norfolk Southern Railroad Company v. Chowan and Washington counties, alleging that the line between said counties where its railroad bridge or trestle crosses Albemarle Sound was in dispute, and offering to pay into court the total amount of tax assessed against said bridge or trestle, and asking to be discharged from further liability on account of the same, and that the tax collectors of the respective counties be restrained from collecting against the railroad said taxes. By consent of the defendants, the money was paid in, and the two counties agreed that the controversy as to the line between them should be adjudicated and settled upon its merits. The judge held that the line between the two counties was the southern shore of Albemarle Sound, and hence that Chowan County was entitled to the entire tax upon the bridge, and a perpetual injunction was granted against Washington County from collecting any tax upon said bridge.

An examination of the statutes sustains the conclusion of the judge. See act 1729 creating Tyrrell County, 2 R. S., 164, and act 1799, creating Washington County, 2 R. S., 167. But pending the decision of the cause in this Court, the General Assembly passed the following act, which was ratified 6 March, 1911:

AN ACT TO ESTABLISH THE BOUNDARY LINE BETWEEN WASHINGTON, CHOWAN, AND TYRRELL COUNTIES.

Whereas the exact boundary line between the counties of Chowan, Washington, and Tyrrell is indefinite and uncertain: therefore,

The General Assembly of North Carolina do enact:

SECTION 1. That the true boundary line between the counties of Chowan on the one side and Washington and Tyrrell on the other side is hereby declared to be the middle of the Albemarle Sound, a straight line parallel to the shores of said counties.

SEC. 2. This act shall be in force from and after its ratification.

There can be no question as to the power of the General Assembly to create and establish counties and to change the lines between them, or to establish lines that are in dispute. The only question before us is as to the intention of this act, as gathered from its terms. The act recites that the line in question is "indefinite and uncertain," and the title declares that the purpose of the act is "to establish" said line. Section 1 thereupon declares that "the true boundary line" between said counties "is hereby declared to be the middle of Albemarle Sound, a straight line parallel to the shores of said counties."

It seems clear from this that the object of the Legislature was not to change, but to declare and establish what it deemed the true boundary between said counties. This is a political question, and the power to so declare is vested in the General

Assembly. Whether the decision of that question is historically correct or not is not a matter subject to review by the courts. There is no question of private right or the impairment of contracts involved. The General Assembly had power to fix the line and to provide to which county the taxes on the property should go.

The cause must therefore be remanded to the court below, to the end that judgment may be entered apportioning the tax upon said bridge, one-half to Chowan and one-half to Washington County, in accordance with the statute above referred to. The costs of this Court and of the court below will be divided.

Remanded.

WALTER F. MORTON ET AL. v. THE BLADES LUMBER COMPANY, MOLLIE E. MORTON ET AL.

(Filed 15 March, 1911.)

1. **Deeds and Conveyances—Mortgages—Assignments—Seal—Title—Trusts and Trustees.**

   The grantee in a mortgage deed assigned the deed under a writing thereon as follows: "For value received the F. and M. Bank hereby bargains and sells to M., his heirs and assigns, this mortgage and all its rights, title, and interest to the property therein, together with all rights and powers contained in said mortgage, without recourse to said bank." The assignment was signed by the proper officers of the bank, and it is *Held*, (1) lacking the seal, the assignment could not operate as a conveyance by the corporation; (2) if with the corporate seal, the assignment was solely of the mortgage deed, the written instrument of conveyance, and the security it affords to the holding of the debt, and it did not convey to the assignee the legal title subject to the trusts and powers contained in the mortgage.

2. **Same—Foreclosure—Procedure—Rights of Assignee.**

   Under an assignment by the mortgagee of the deed, insufficient to pass the legal title, the assignee acquires only the mortgage debt and the right by proper legal proceedings to subject the lands to its payment.

3. **Deeds and Conveyances—Mortgages—Assignments—Title—Principal and Agent—Payment—Ratification—Issues—How Considered—Invalid Sale—Equities—Charge Upon Land.**

The owner of three tracts of land, by his agent M., gave to B. a sixty-day option on the timber growing thereon, at the price of $1,400. On one of these tracts of land a mortgage had been executed by the owner to a bank to secure an indebtedness of $160, which was assigned to M. by the bank by a writing on the instrument insufficient to pass the title. M. borrowed $150 of B., and gave him the assigned mortgage as security, and without the knowledge of the mortgagor M. foreclosed, and B., the holder of the option, became the purchaser. It was found by the jury in response to two of the issues submitted that B. had paid $670 and that the mortgagor had received from M. "all the proceeds of the mortgage sale under the agreement": *Held*, (1) the two issues must be considered with reference to the pleadings and evidence; (2) that the word "agreement" referred to the timber option, the only agreement known to the owner; (3) in selling under the mortgage on the land, M. acted as the agent of B., the owner of the mortgage debt; (4) the land mortgaged being in a tract larger than the other two and containing timber estimated at more than one-half of the timber embraced by the option, the $670 paid by M. was the amount due for the timber on that land, which the owner ratified by accepting, and to that timber B. got a clear title; (5) in equity the mortgaged lands should only be chargeable with the $160 secured by the mortgage to the bank, in favor of B., who had paid it.

APPEAL from *Ward, J.*, at November Term, 1910, of CRAVEN.

In this action these issues were submitted to the jury:

1. Did Mollie E. Morton, widow of M. F. Morton, become the owner in fee of the lands in question at the death of said M. F. Morton? Answer: Yes.

2. Did the Blades Lumber Company, through W. B. Blades, collude with J. A. Morton to procure the note and mortgage to be assigned to said Morton, and procure the land therein described to be sold with purpose of gaining the same to the loss of profit of plaintiffs? Answer: No.

3. Did the legal title to said lands pass to Blades Lumber Company under deed of J. A. Morton, dated 11 November, 1901? Answer: No.

4. What amount of money has been paid, in all, by said Blades Lumber Company? Answer: $670, paid 11 November, 1901.

5. Did Mollie E. Morton accept and receive from J. A. Morton all the proceeds of the mortgage sale under agreement? Answer: Yes.

His Honor, upon these findings, adjudged the defendant Mollie E. Morton to be the owner in fee of the tract of land described in the complaint and in the mortgage from M. F. Morton and wife to the Farmers and Merchants Bank and in the deed from J. A. Morton to W. B. Blades and others dated 11 November, 1901, but charged the land with $670 and interest from 11 November, 1901, in favor of the Blades Lumber Company, the grantee of W. B. Blades and his associates.

To this judgment the Blades Lumber Company and W. B. Blades excepted and appealed.

W. D. McIver for plaintiff.
Moore & Dunn and Guion & Guion for defendants.

BROWN, J. It appears from the record that the defendant Mollie E. Morton filed an answer in which she claimed the tract of land by survivorship, which has been adjudged in her favor. In her answer she adopts certain allegations in the complaint and asks as against the Blades Lumber Company and W. B. Blades and his associates the same relief which the plaintiffs asked against those defendants.

The facts which appear to be admitted or found by the jury are as follows: On 12 September, 1901, J. A. Morton, agent for J. R. Henry and Mollie E. Morton, executed to the Blades Lumber Company an option for sixty days for the timber of a certain size on three tracts of land, one of which was the tract of land under mortgage to the Farmers and Merchants Bank. The option price was $1,400.

The timber only was embraced in this contract. The land belonging to Mrs. Morton had been conveyed by herself and husband by mortgage, dated 22 June, 1891, to the Farmers and

Merchants Bank, securing a note for $160. After M. F. Morton's death this mortgage was assigned to J. A. Morton in these words:

> For value received, the Farmers and Merchants Bank hereby bargains and sells to J. A. Morton, his heirs and assigns, this mortgage and all its rights, title, and interest to the property described therein, together with all rights and powers contained in said mortgage, without recourse to said bank.
>
> L. H. CUTLER, *President.*
> July 5, 1901. T. W. DEWEY, *Cashier.*

On 6 November, 1901, J. A. Morton assigned said note and mortgage to W. B. Blades as collateral security for a debt of $150 due said Blades by said Morton.

On 11 November, 1901, this mortgage was foreclosed by J. A. Morton, and the land sold at public sale to W. B. Blades and others, trading as the Blades Lumber Company, for $350, and J. A. Morton executed a deed to them in pursuance of the power of sale contained in the mortgage.

1. It is contended by the defendants, the Blades, that they acquired an indefeasible title to the land by virtue of said conveyance, and that his Honor erred in directing a verdict on the third issue.

It is to be observed that the assignment to Morton by the officers of the bank is not a deed, for it lacks the seal of the corporation. If it had a seal it does not in terms profess to act upon the land, the subject-matter of the mortgage deed, nor upon any estate or interest which the assignor, the bank, may have therein.

This assignment does not convey to Morton the legal title subject to the trusts and powers contained in the mortgage. It is the mortgage deed, the written instrument of conveyance, and the security it affords to the holding of the debt, that is assigned, not the land itself.

The legal title remained in the Farmers and Merchants Bank undisturbed, and held in trust by it for the benefit of the owner of the note.

This assignment vested in Morton no authority whatever to execute the power of sale contained in the mortgage, and consequently he could convey nothing to Blades; and the latter acquired nothing except the mortgage debt and the right by proper legal proceedings to subject the land to its payment.

The assignment is in terms very similar to that in *Williams v. Teachey,* 85 N. C., 403, a case frequently cited and approved. *Dameron v. Eskridge,* 104 N. C., 621; *Hussey v. Hill,* 120 N. C., 312; *Morton v. Lumber Co.,* 144 N. C., 33.

2. It is contended that Mrs. Morton is estopped from denying Blades' title to the land because she ratified the foreclosure sale and received the proceeds. In support of this contention the Blades Company relies upon the findings to the 4th and 5th issues. These two issues must be considered together and construed with reference to the pleadings and the evidence. The word "agreement" used in the 5th issue must refer to the option to purchase the timber. There is not a scintilla of evidence that Mrs. Morton was a party to or had knowledge of any other agreement, or that any other contract or agreement was entered into by J. A. Morton in her behalf. There is no evidence that Mrs. Morton had any knowledge of the foreclosure sale or ratified it by word or act. When that sale was conducted by J. A. Morton he was not acting as her agent, for she was the mortgagor, but he was acting for Blades, who held the mortgage debt and was to all intents and purposes the mortgagee. He had furnished J. A. Morton the money with which to take up the mortgage debt and he had assigned it to Blades before the foreclosure sale.

The sale was conducted by Blades' own agent, J. A. Morton, and Blades' attorneys prepared the deed, although Blades deducted the attorneys' fees from the timber option-money due Mrs. Morton, and of this deduction she appears to have had no knowledge.

The entire evidence for plaintiff as well as defendants shows conclusively that Mrs. Morton received nothing on account of the foreclosure sale of the land, and that Blades paid nothing for the land except the $150 advanced to J. A. Morton and for which he assigned to Blades, prior to the foreclosure, the bank mortgage.

The timber agreement of 12 September, 1901, relates to the timber only and not to the land. By its terms Blades had the right to purchase the timber for $1,400. It covered the tract now in controversy, also one tract belonging to J. R. Henry and one other small tract of Mrs. Morton's. The evidence of R. H. Mills, the witness and agent of Blades, who negotiated the timber sale, proves that the tract in controversy was larger than the two other tracts mentioned in the option, and that the timber on it was worth, as estimated by him, a little more than one-half of the $1,400 to be paid for the timber on all three tracts.

W. B. Blades testifies: "We settled with J. A. Morton for the three tracts of land according to the option, less some expenses for perfecting the title." What option? There was only one in this record, and that relates to the timber and not to the land. So it is indisputable that the $670 paid Mrs. Morton was the amount due her for the timber on this land in controversy, according to the terms of the option agreement, and when she received it she received it as such, and without any knowledge that it was intended as payment for the land itself.

All the evidence shows that the only money Blades is out of pocket on account of this land is $670 timber option-money and the amount he paid for the bank mortgage, about $150.

We therefore have no difficulty in concluding that the issues as framed and answered by the jury, construed with reference to the pleadings and all the evidence, including that offered by the Blades Company, do not estop Mrs. Morton from asserting her title to the land in controversy.

In adjusting the equities between the parties we think the land should be charged in any event with the amount due on the mortgage debt of the Farmers and Merchants Bank assigned to Blades, which the judgment fails to do.

We are also of opinion that it is erroneous to charge the land with the $670 paid to Mrs. Morton for the timber. This is more prejudicial to Blades than to Mrs. Morton, as it can be justified only in the assumption that as Blades acquired no title to the land, he acquired none to the timber, and that he or his assigns may still be held accountable for its value by Mrs. Morton, if it has been cut.

When Mrs. Morton received the $670 she received it in payment for the timber in manner and form as set out in the written contract dated 12 September, 1901, and which is made a part of the answer of the Blades Company. By this she ratified and confirmed the sale of the timber of the dimensions therein expressed to Blades, and he and his assigns have acquired an equitable title thereto which the courts will enforce.

Therefore, inasmuch as Blades has acquired title to such timber as he paid the $670 for, and cannot be made to answer for damages for having cut it, the land should not be charged with that sum, because that would imply an adjudication that Blades acquired no title to the timber.

Let the costs of this appeal be taxed against the Blades Company and W. B. Blades.

As modified, the judgment of the Superior Court is

Affirmed.

HIRAM BAGGETT v. HENRY A. GRADY ET AL.

(Filed 15 March, 1911.)

1. **Application for License—Supreme Court—Investigation—Affidavits—Defamation—Absolute Privilege.**

   Affidavits filed in the Supreme Court in response to a citation by that Court and used while considering the question of granting a license to an applicant to practice law are absolutely privileged, and no action for damages will lie because the affidavits contained defamatory relevant matter affecting the character of the applicant.

2. **Same—Conspiracy—Evidence.**

   The Supreme Court has complete jurisdiction over the granting of licenses to practice law; and when the Court has under consideration the question of granting a license to an applicant, and issues a citation to certain persons to appear, and in compliance therewith they do appear and file affidavits relevant to the inquiry and affecting the character of the applicant, no evidence of conspiracy is shown, the defamatory matters contained in the affidavits being absolutely privileged, and called for by the Court in the progress of the inquiry.

3. Witnesses—Privileged Communication—Responsive Answers—Objections and Exceptions.

It is the province of counsel to object to irrelevant matter, and a responsive answer by a witness to a question of a defamatory nature, when no objection is made, or, being made, is overruled, cannot make the witness liable in an action for damages.

APPEAL from *Whedbee, J.*, at October Term, 1910, of SAMPSON.

This was a civil action. The action was for damages alleged to have been caused the plaintiff by reason of certain affidavits filed by the defendants in the Supreme Court of the State affecting the moral character of the plaintiff, and protesting against the issuance to him of a license to practice law. At the conclusion of the evidence a motion to nonsuit was sustained, and plaintiff appealed.

E. F. Young and J. C. Clifford for plaintiff.
Faison & Wright and Fowler & Crumpler for defendant.

BROWN, J. This action grows out of certain proceedings before this Court which were had when plaintiff applied for license to practice law. *In re License,* 143 N. C., p. 1.

Upon that hearing, in consequence of information received by us affecting the character of plaintiff, this Court being desirous of knowing the true facts, caused notice to be given the applicant, Hiram Baggett, and caused a citation to issue to the law firm of Grady & Graham, commanding them to appear at a date fixed in said citation and inform the Court as to any facts within their knowledge concerning the moral character of said applicant. In obedience to said mandate the defendant Henry A. Grady appeared before this Court and filed certain affidavits, one of which was made by himself, one by the defendant McPhail, and one by the defendant Wilson. The plaintiff, Hiram Baggett, also appeared in answer to the citation served on him, and filed affidavits in support of his character and moral standing. Certain parts of the affidavits filed by the defendants are copied in the complaint, and contain the matters alleged to have been libelous. All of said affidavits were read before the Supreme Court, while the Court was considering the application of the plaintiff for a license to practice law; and this is the only publication of said charges proven or testified to upon the trial, except such mention thereof as was made in the newspapers by the reporters who attended the hearing.

The plaintiff also alleges that there was a conspiracy between the several defendants to injure his character, and to prevent him from getting a license to practice law.

At the conclusion of the plaintiff's evidence, on motion of counsel for the defendants, a nonsuit was granted, and the plaintiff excepted and appealed.

The judgment of the Court must be sustained, for two reasons:

First. The affidavits were absolutely privileged, because made and used in proceeding, before a court, relevant to the inquiry, and while in the determination thereof, and the same having been called for by the court.

Second. There was no evidence whatever of a conspiracy between the several defendants to injure the name or character of the plaintiff by the use of the alleged defamatory matter set out in the complaint.

As to the question of privilege, it is well settled that what a party or witness says or does in the progress of a trial, relevant to the issue, whether actuated by malice or not, is absolutely privileged. *Runge v. Franklin,* 72 Tex., 585, 13 Am. St. Rep., 833; *Nissen v. Cramer,* 104 N. C., 574.

This Court has complete jurisdiction over the granting of licenses to practice law. The plaintiff was an applicant and the Court was considering his application.

The affidavits were filed in obedience to the mandate of the Court, and are therefore absolutely privileged. They were strictly relevant to the matter under consideration, but in this respect the privilege of a witness extends beyond that of counsel; for it is not the business of a witness to consider whether the subject under inquiry is relevant or not. This is strictly the province of counsel and of the court, and if no objection is made to a question, or, if being made, is overruled, it is the duty of a witness to assume that it is relevant and to answer it; and for his answer, when responsive to the question, he cannot be held liable in a civil suit.

Kemper v. Fort, 219 Pa., 85; 123 Am. State Rep., 623, and notes; *Barrows v. Gray,* 7 Gray, 301; *Nissen v. Cràmer,* 104 N. C., 575.

The judgment of the Superior Court is

Affirmed.

W. L. SHERROD v. M. J. BATTLE ET AL.

(Filed 15 March, 1911.)

1. **Deeds and Conveyances—Boundaries—Questions for Court—Questions for Jury.**

   It is a question of law for the court to determine from the face of a deed what are the boundaries therein called for, to be located by the jury when the facts are disputed.

2. **Deeds and Conveyances—Interpretation—Intent—Natural Boundaries—Course and Distance.**

   There being less likelihood that the parties to a deed have erred as to the location of natural objects therein called for, the court will effectuate their intention by allowing natural objects, such as rivers, well-defined streams, islands, trees, or a ditch, which are called for, to control course and distance.

3. **Deeds and Conveyances—Calls—Boundaries—Questions for Jury—Instructions.**

   Where there is ambiguity in the calls of a deed the jury should be instructed by the judge upon the established rules of law applicable, so that they may be aided in their finding upon the evidence as to the true location of the calls; and it is none the less the duty of the judge to so instruct the jury as to what is a boundary, and where it is, when the facts are undisputed and the parties concede that its location is to be fixed by a legal construction of the deed.

4. **Deeds and Conveyances—Boundaries—Ditches—Definition.**

   The words "ditch" or "drain" have no technical or exact meaning; either may indicate a hollow or open space in the ground, natural or artificial, where water is collected or passes off; and such, if sufficiently defined, may bound land as other natural objects.

5. **Deeds and Conveyances—Boundaries—Ditches—Evidence, Conflicting—Lines—General Direction—Course.**

A disputed divisional line between adjoining lands of the parties was made to depend upon a description in a conveyance, as follows: "Beginning at the head of a ditch on the E. and T. road, running with said ditch in an eastern direction to a branch, thence with said branch to the edge of G. Swamp, thence due east to the canal," etc. The beginning point and the line from there to the second call in the deed were not disputed, but there was evidence tending to show a continuation of the ditch in two directions; that one was a lead ditch continuous from the beginning corner, with the other emptying into it, the latter extending in an eastern direction, and that, by following either, the calls in the deed might be met: *Held*, (1) it was for the jury to say which of these ditches was called for in the deed, and the one so found would control course and distance; (2) the call for the line, "running with the ditch in an eastern direction," was not controlling so as to exclude a line running with one of the ditches in a general eastward direction, because it varied its course, sometimes east, northeast, and even north, in favor of the other running more nearly in an eastern direction.

6. **Deeds and Conveyances—Intent of Grantor—Declarations—Parol Evidence—Reformation—Mutual Mistake.**

The grantor's declaration as to his intent cannot affect the location of lines expressed in his deed where the reformation of the deed on the ground of mutual mistake is not sought in the action.

7. **Deeds and Conveyances—Description—Number of Acres—Aider.**

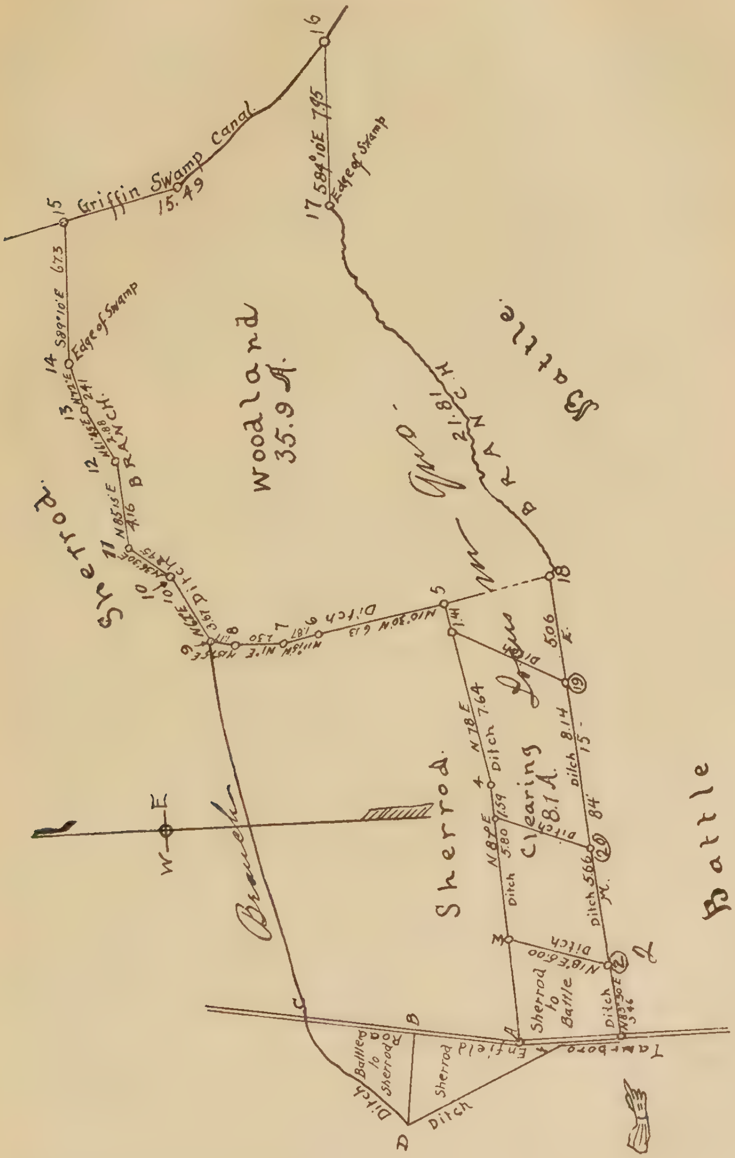
For instances in which the number of acres mentioned in the deed to lands may aid the description therein, *Whitaker v. Cover*, 140 N. C., 280, cited and approved.

APPEAL by defendant from *Peebles, J.*, at October Term, 1910, of EDGECOMBE.

The case is stated in the opinion of the Court by *Mr. Justice Walker.*

F. S. Spruill for plaintiff.

Jacob Battle and Claude Kitchin for defendant.


Griffin Swamp Canal
15.49
15
16
S89°10'E 6.73
14
Edge of Swamp
17
S84°10'E 7.95
Edge of Swamp
13
N72°E 2.41
12
N61°45'E 2.88
BRANCH
11
N85°15'E 4.16
10
N36°30'E 1.45
Ditch
9
N12°E 3.67
1.01
8
N43°E
N1°E 2.50
7
N11°45'W 1.87
6
Ditch
N10°30'W 6.13
5
1.41
18
5.06
K
19
Woodland
35.9 A.
BRANCH
21.81
Battle
Sherrod
Jno.
Sherrod
Clearing
58.1 A.
N78E Ditch 7.64
4
1.59
N82E 5.80
Ditch
3
N18°E 6.00
Ditch
2
Ditch 8.14
15
84
20
Ditch 5.66
M
Ditch
N83°30'E
3.46
Sherrod to Battle
A
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Ditch
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Tarboro
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Battle

WALKER, J. This action was brought to recover the possession of a tract of land and damages for the unlawful detention of and injury to the same. The plaintiff's right to the relief demanded was conceded to depend upon the correct location of a call in the deeds from M. J. Battle to Mary A. Powell and from Mary A. Powell to M. J. Battle, guardian. The true boundary line between adjoining tracts is the question in controversy. The call is as follows: Beginning at the head of a ditch on the Enfield and Tarboro road, about equidistant from the buildings on the land of J. H. Cutchin and (those on) the Nevill place, running with said ditch in an eastern direction to a branch, thence with said branch to the edge of Griffin Swamp, thence due east to the canal, and thence by various calls to the beginning.

The plaintiffs contend that the line should be run from the first station with the ditch, *in an easterly course*, to the branch, and thence with the other calls to the edge of the swamp (indicated on the map as lines 1, 2, 20, 19, 18, 17, and 16), and if this is done, it is admitted that they must succeed and the defendants must fail.

The defendants, on the contrary, insist that the line should begin at the ditch (figure 1), which is admitted to be the true beginning corner, and that the call for the ditch means what they say is the "lead ditch," and that, therefore, the other calls should follow the course of that ditch until it empties into a branch, which is considerably north of the branch which the plaintiffs say is the one mentioned in the deeds.

The judge charged with the plaintiffs, and told the jury that in locating the line they must follow the course of the lower ditch, which begins at the figure 1 and leads in an easterly direction and almost due east, while to follow the other ditch would describe a line running east about 3½ chains, thence N. 18 E. 5 chains, thence N. 87 E. 5.80 chains, thence N. 78 E. 9 chains, thence N. W., thence by several zigzag lines varying in course from due north to northwest and thence due east to the upper edge of the swamp.

We do not agree altogether with his Honor as to the law of the case. The question as to what are the boundaries of land is one of law, but as to where they are is for the jury to determine. *Jones v. Bunker,* 83 N. C., 324; *Gudger v. White,* 141 N. C., 519. Natural or physical monuments are generally preferred, in questions of boundary, to other less certain objects called for in a deed, because they are fixed and more easily identified and there is less apt to be any mistake in regard to them. But the object of the law in settling disputes is certainty and the effectuation of the intention of the parties, as gathered from the deed or other instrument. Natural objects, such as a river or other well-defined stream, or an island or tree, or even a ditch, will control a call for course and distance as being the more reliable of the two calls. Unless an actual survey is made, the parties may mistake course and distance, and even when a survey is made, a mistake in either of the two calls for course and for distance may occur; but it is hardly to be supposed that the parties will err as to the true location of a natural object. The only question, in such a case, which remains for determination, is as to which object is the one intended to be described, when there are two or more, which the parties contend and there is evidence to show, answering to the call or description; and this is the very point we must now decide. Does not the same general rule prevail as in the case we have first stated? The preference, it seems to us, must be given to that object which more clearly and, therefore, the more surely fits the description. It must be, and such is the law, that where there is an ambiguity in the calls of a deed, the judge must guide the jury by such instructions as will enable them to locate the line in dispute according to the established rules of law, but it is not the less the duty of the judge to instruct the jury as to what is the boundary, and where it is, when the facts are undisputed and the parties concede that its location is to be fixed by a legal construction of the deed. If the case is thus considered, we are led to the conclusion that the question should have been submitted to the jury as to which ditch was intended by the parties to the deed, finding that intention by fitting the description in the deed to the object called for. The determination of what boundary was intended is one of construction, dependent upon the terms of the entry, patent, conveyance, or other instrument, its identity being a question of fact for the jury to decide. The principle thus established finds a simple illustration in this case. The call is for the beginning corner "at the head of a ditch on the road," admitted to be at the point indicated on the map by the figure 1, and thence "running with said ditch in an eastern direction to a branch." The words "ditch" or "drain" have no technical or exact meaning. They both may mean a hollow or open space in the ground, natural or artificial, where water is collected or passes off. *Goldthwaite v. Bridgewater,* 71 Mass. (5 Gray), 61, and, if sufficiently defined, may bound land as other natural objects. *Bradford v. Cressey,* 45 Me., at p. 13. There is but one ditch at the beginning corner, and the first call, "thence running with said ditch," means, by construction of law, that ditch. Both parties concede that the call, so far as it extends from the figure 1, at the beginning, to the figure 2, is a part of the divisional line, but the difficulty in locating the entire line is encountered at the figure 2. The plaintiff says the line should be extended to the figure 18, as there is a ditch from 2 to a point near 18, which runs "in an eastern direction," and there is a branch at or near 18 which, if pursued in accordance with the further call, will go to the lower edge of the swamp and thence due east to the canal; while the defendant says that the ditch from 2 to 19 gives out at that point and is no part of the "lead ditch" from 1 to 2, but is a tributary of that ditch, emptying into it and is very shallow, and that the lower branch, claimed by the plaintiff as the one called for, is small, and in dry weather there is no flowing water in it, and that the branch is not at 18, but a little to the east of it. They further say that the ditch at the beginning corner is a deep one, a leading and main ditch, and the waters of the other ditches flow into it, and that it runs for some distance "in an eastern direction to 2, and thence N. E. to 3 and thence eastwardly to 5 and thence about north to 9, where it enters a large branch which flows from C to 9 (now indicated on the map). This ditch, they say, is in a ravine and receives the natural drainage of the adjoining land, and that if there was no ditch there, the main body of water would find its way through the ravine to the swamp.

The contentions of the respective parties were supported by evidence. It all comes to this: The ditch at the beginning corner is the one called for as the boundary line dividing the two tracts of land. If that ditch extends from 1 to 19 it controls the call, and if it gives out there, the line will be extended "in an eastern direction" to the nearest point on the lower branch; but if the ditch from 2 to 19 is no part of the one at the beginning corner, and the latter ditch runs from 1 to 2 and thence on to the upper branch at 9, as the defendant contends it does, that is the divisional line, and it will be further extended with the upper branch and the call due east to the swamp and canal. It is for the jury to say which is the ditch, as called for in the deeds, and however this fact is ascertained to be, it will control the course.

The court instructed the jury as follows: "What are the boundaries of a tract of land is a question of law; where these boundaries are is a question of fact. Both parties admit that the beginning point is at 1, and the ditch from 1 to 2 constitutes a part of the dividing line in dispute, and if the jury find from the evidence that there was a ditch running from 1 towards 18, it is their duty to go to that point, 18, even though the ditch gave out at 19, and to answer the first issue in favor of the plaintiffs; that the line contended for by the defendants did not run in an eastern direction and did not answer the call in the deed from M. J. Battle to Mary A. Powell."

The learned judge erred in taking the disputed question from the jury, even though there may be *a* ditch from 2 to 19. That fact, of itself, did not locate the line as matter of law. The question of fact was whether the ditch from 2 to 19 was a part of the ditch at the beginning corner, or did that ditch lead in another direction, that is, from 2 to 3 and thence to 9. The calls for an "eastern direction" was not controlling. The ditch at the beginning corner does run a little north of east for some distance, and the fact that its course is then changed does not necessarily destroy its identity. While its course is a varied one, sometimes east and northeast and even north, its general course bears eastwardly. It will be competent, in locating the ditch, to consider the calls of the deed for an "eastern direction," with the other facts, namely, that the lower ditch ends at 19, that it is a small ditch emptying into the other ditch at 2, that the latter ditch is larger and better defined and continues from 1 to 2 to 3 and thence to 9, but that it has various courses in different directions, its general trend being eastward, although the course of one line is north or a little west of north. The jury, of course, may consider the other relevant facts and circumstances in their effort to identify the ditch, but which ditch is the one called for is for them to determine and not for the court as a naked proposition of law. We think our conclusion is supported by the authorities.

In *Spruill v. Davenport,* 46 N. C., 203, it is said, quoting from *Tatem v. Paine,* 11 N. C., at p. 71: "What are the termini or boundaries of a grant or deed is matter of law; where those boundaries or termini are is matter of fact. It is the province of the court to declare the first, that of the jury to ascertain the second. Where natural objects are called for as the termini, and course and distance and marked lines are also given, the natural objects are the termini, and the course and distance and marked lines can only be resorted to by the jury to ascertain the natural objects; they act as pointers or guides to the natural objects. When the natural boundary is unique, or has properties peculiar to itself, these pointers or guides can have but little effect—in fact, I believe none. Where there is more than one natural object in the neighborhood answering the description, that is, having common qualities, then those pointers or guides may be adverted to, to ascertain where the object called for is, or which is the object designated. They do not then contradict or controvert natural boundary; they explain a latent ambiguity created by there being more than one object which answers the description. It is completely within Lord Bacon's illustration of the rule as to a latent ambiguity. The judge was, therefore, right in his general observation, that natural boundaries must prevail over artificial. But this is rather a rule of law than of fact; it governs, properly speaking, him and not the jury." *Judge Battle,* who delivered the opinion in *Spruill v. Davenport,* then proceeds to say: "The error in the charge in the present case consisted in giving an undue effect to the term 'westwardly.' The term 'westwardly,' with nothing to control it, may perhaps mean west or due west, but it is evident that such is not its precise signification, and hence it is readily controlled by circumstances, which goes to show that a due west course could not have been intended. *Brandt v. Ogden,* 1 Johns., 155. Such is the case here. The call is 'westwardly' along the said Spruill's line. Now, Spruill's line thus called for is not a single straight line running due west, but consists of several lines, as appears by the plat, running sometimes a few degrees to the north, and sometimes a few degrees to the south of a due west course." A casual inspection of the map filed in *Spruill v. Davenport* will show that the call "westwardly with Spruill's line" was almost as eccentric in its courses as the one we have in this case.

"A *latent* ambiguity exists when, there being no defect in the description on the face of the instrument, it becomes necessary to fit the description to the thing—in other words, to identify it; and in introducing parol evidence for this purpose, the uncertainty appears." *Deaf and Dumb Inst. v. Norwood,* 45 N. C., 69. The language of a deed applying to more objects than one, evidence may be given of surrounding circumstances to ascertain which object was intended. If the document applies in part, but not with accuracy, to surrounding circumstances, inferences may be drawn from the said circumstances as to the meaning of the document, whether there is more than one or only one thing or person to which or to whom the inaccurate description may apply. Steph. Ev., Art. 91 (7) and (8); *Graybeal v. Powers,* 76 N. C., 66; *Rowe v. Lumber Co.,* 133 N. C., 433 (*s. c.,* 138 N. C., 466); 5 Cyc., p. 870; *Opdyke v. Stephens,* 28 N. J. Law, 83; *Sanborn v. Clough,* 40 N. H., 316; *White v. Bliss,* 62 Mass. (8 Cush.), 510. In *Opdyke v. Stephens, supra,* we find a clear and succinct statement of the law upon this subject: "In settling a question of boundary, when there is a latent ambiguity in the description contained in the deed, or a doubt as to the true location of the lines, evidence *aliunde* is admissible to show where the lines are.

Boundaries may be proved by every kind of evidence admissible to establish any other fact. The question of construction is a question of law to be decided by the court upon the terms of the instrument itself, and where no latent ambiguity exists it must be decided without evidence *aliunde;* but a question of location or the application of a grant to its proper subject-matter is a question of fact to be determined by the jury by the aid of extrinsic evidence."

Two cases decided by this Court afford striking illustrations of the rule in the law of boundary, that when two objects are called for, and there is doubt as to which of them answers the true call, it is for the jury to find upon oral and extrinsic evidence, as between the two or more objects, the one intended by the parties. *Hurley v. Morgan,* 18 N. C., 425; *Becton v. Chesnut,* 20 N. C., 335.

There is a question of evidence in the case. Plaintiff's witness, W. L. Sherrod, was permitted, against defendant's objection, to testify as to a declaration made by M. J. Battle, after he had parted with the land, as to the line, which was to the effect that in conveying the land to his mother, Mary A. Powell, he intended the lower line, which is contended by the plaintiff to be the boundary, that is, from 1 to 19; but in looking at his deed he found it plain that it was not the line. This testimony, if competent as a declaration of a third person, would seem to be in favor of the defendant; but the location of the line is not to be affected by his intention, unless it is expressed in the deed. The calls of the deed as they are, and not as they were intended to be, must govern, for as said by *Judge Ashe* in *Scull v. Pruden,* 92 N. C., 168: "In questions of boundary, what are the boundaries of a tract of land is a question for the court; where are the boundaries is a question for the jury; and in the construction of deeds, the first rule is that the intention of the parties is, if possible, to be supported; and the second rule is, that this intention is to be ascertained by the deed itself, that is, from all the parts of it taken together." If the call is not in the deed, the mere intention to insert it, which failed, can have no weight. A call may not be varied to satisfy an unexpressed intention. *Graybeal v. Powers,* 76 N. C., 66.

If there was a mutual mistake, and not the mistake of one party only, the deed should be reformed; otherwise, it must remain and be construed as it is written.

We were not informed as to what bearing the acreage of the two tracts has upon the question in controversy. Perhaps none, as it was not mentioned. "Ordinarily, the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located; but in doubtful cases it may have weight, as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, may have a controlling effect." *Whitaker v. Cover,* 140 N. C., 280; *Harrell v. Butler,* 92 N. C., 20; *Baxter v. Wilson,* 95 N. C., 137.

His Honor in his charge assumed, as a fact, that the ditch from 1 to 2 and from 2 to 19 were parts of the same ditch and are continuous and identical throughout, whereas that was a question for the jury, as there was a latent ambiguity. A new trial must be awarded for this error.

New trial.

SALLIE M. JENKINS v. THE MONTGOMERY LUMBER COMPANY.

(Filed 15 March, 1911.)

1. **Timber Deeds—Contracts—Trees Under Size—Trespass.**
   An action against the grantee in a timber deed, or his assignees, for the cutting of trees of less dimension than those specified in the deed is virtually one for trespass on the land in wrongfully cutting and removing timber therefrom.

2. **Timber Deeds—Contracts—Time for Cutting—Expiration—Ownership.**
   Trees not cut by the grantee or his assignees under a timber deed within the period of time therein fixed for the purpose become the property of the owner of the land.

3. **Same—Offset.**
   The grantee in a timber deed may not offset damages to the land sustained by the owner, caused by his wrongfully cutting

trees under the size specified in his contract, by the value of the trees of the specified size he has left on the land after the expiration of the period of time allowed for his cutting them, as such have then become the sole property of the owner.

4. **Timber Deeds—Contracts—Trees Under Size—Measure of Damages.**

The measure of damages in an action against the grantee in a timber deed for the wrongful cutting of trees under the size specified in the contract is the difference between the value of the land before and after the wrong was committed, or the amount by which the land was diminished by the trespass.

APPEAL by defendant from *Joseph S. Adams, J.*, at Fall Term, 1910, of GATES.

The facts are sufficiently stated in the opinion of *Mr. Justice Walker.*

W. M. Bond for plaintiff.

L. L. Smith, Aycock & Winston, and F. S. Spruill for defendant.

WALKER, J. The plaintiff brought this action to recover damages for trespassing on land and injuring the same by cutting trees and removing them therefrom. Plaintiff, being the owner of the land, had contracted with one L. Hofler that he might cut and remove therefrom all the pine, oak, gum and maple timber standing thereon and measuring 12 inches or more at the stump. Defendant acquired all the rights of Hofler and his assignees, Truitt & Co., under the contract, but instead of cutting and removing only the timber of the size mentioned in the contract, it cut and removed much smaller timber, and thereby damaged the land. The action is virtually one for trespass on the land in wrongfully cutting and removing timber therefrom. Two questions are presented: the first one by the exclusion of testimony offered by the defendant to show that, at the expiration of the time allowed for cutting and removing the timber, he left on the land timber of the contract size sufficient in quantity to more than offset the plaintiff's damage from cutting the undersized timber. Defendant contends that this was a legitimate matter to be considered by the jury in assessing the plaintiff's damages, but no authority in point was cited for the position. We have decided at this term (*Hornthal v. Howcott, ante,* 228) that the trees not cut within the period fixed by the contract were the property of the owner, or, as in that case, of his grantee. *Justice Allen,* summing up the law upon the subject, as settled by prior decisions, said: "At the expiration of four years, under the terms of the deed, the Roper Lumber Company had no title to the timber not removed, and the effect of the deed was to convey to the lumber company all the pine and poplar timber cut and removed within four years, and no more. The exception is no broader than this. Therefore the deed of the plaintiffs to the defendants conveys the land and all the pine and poplar timber not cut and removed by the Roper Lumber Company within four years from the date of the deed to it." The decision is fully sustained by the cases cited. *Bunch v. Lumber Co.,* 134 N. C., 121; *Hawkins v. Lumber Co.,* 139 N. C., 163; *Lumber Co. v. Corey,* 140 N. C., 467, and *Strasson v. Montgomery,* 32 Wis., 52. In the *Hawkins case, Justice Hoke* thus tersely stated the principle: "The true construction of this instrument is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed." We said in *Bunch v. Lumber Co., supra,* that: "In no event should we give a construction to the instrument which will confer any greater right or estate than is commensurate with the object and purpose of the parties, as expressed in it. The spirit and letter of the contract exclude the idea that when the time fixed by it expired the defendant's assignor was to have any right, interest, or estate in the timber then standing on the land. . . . The conveyance is of all the trees and timber on the premises, with the proviso that the vendee should take the same off the land within four years. It is well settled, on principle and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises," citing *Strasson v. Montgomery, supra.* As, therefore, the trees remaining upon the land belonged to the plaintiff, it follows that defendant's leaving them there cannot be used by him in recoupment of the plaintiff's damages. A debtor has no right, either legal or moral, to pay his debt with the property of the creditor. He would be paying nothing, but merely conceding to his creditor that which already is his. This claim being without any foundation in law, must, we think, be rejected, and this disposes of the first three exceptions.

The next and last exception is to the judge's charge that the measure of damages is the difference between the value of the land before and after the wrong was committed, or the amount by which the land was diminished in value by the trespass. We do not well see why this was not the proper rule. It could not be merely the value of the fallen trees, for, if undersized or very small, they might have no appreciable value. The safest and best standard is that which his Honor adopted, and we have so held at this term (*Williams v. Lumber Co., ante,* 306). The opinion in this case was also delivered by *Justice Allen,* who said: "In a note to *Louisville R. R. v. Beeler,* 15 Am. and Eng. Anno. Cases, 916, the authorities from Canada, the Supreme Court of the United States, and from the highest courts of all the States are collected, numbering more than two hundred, and from an examination of these it appears that the decided weight of authority is in favor of the rule that the measure of damage is the decrease in the value of the land by reason of the cutting, or the difference in the value of the land before and after cutting, although there are many cases in favor of the rule that the measure of damage is the value of the trees on the land after they have been severed. We think this conflict of authority probably had its origin in the different forms of actions at common law, and to the distinctions between the actions of trover and conversion, *trespass de bonis asportatis* and *trespass quare clausum fregit.* If one entered upon the land of another and cut trees thereon, the owner of the land and of the trees had his election at common law to sue in trover and conversion or in *trespass de bonis asportatis* for the value of the trees, or in *trespass quare clausum fregit* for injury to the freehold or the land, or to the possession of it. In the case of merchantable timber, trees having a marketable value, the recovery would ordinarily be the same under either rule; but the contention of the defendant, if sustained, when applied to trees too small to have a market value, would work a great injustice." The rule as thus settled would seem to be a fair and most reasonable one and easy of application. It is sustained in the opinion by cogent reasoning and the citation of well-considered authorities.

We find no error in the rulings to which exceptions were taken.

No error.

VIOLA BODDIE v. V. N. BOND.

(Filed 22 March, 1911.)

1. **Lands—Title—Equitable Estoppel—Divisional Lines.**

A party claiming title to lands only by reason of an equitable estoppel of the other party to the action, arising from his alleged acts and conduct respecting a line between adjoining lands, must show that the acts and conduct relied on have misled and caused him loss or damage.

2. **Same.**

A party seeking in his action to estop another by his acts and conduct from claiming certain lands must show that he has been misled and prejudiced in some way by the same; otherwise, the acts and conduct relied on would not appear to cause him loss or damage.

3. **Same—Deception—Fraud—Principal and Agent—Ratification—Evidence.**

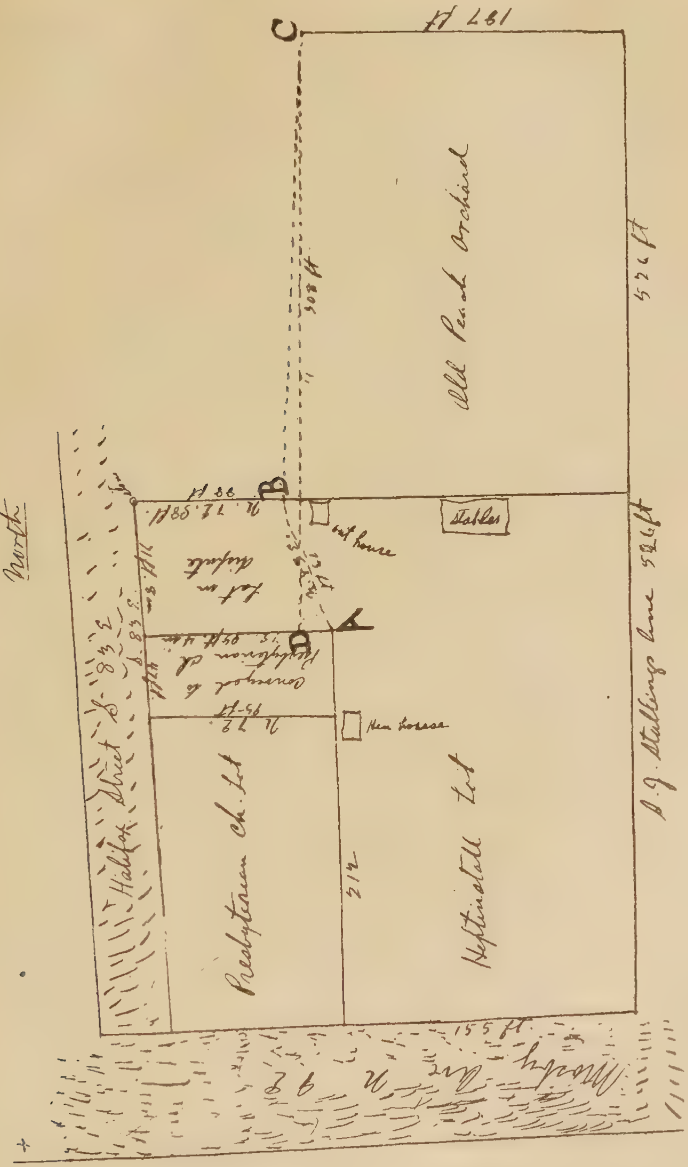
The title to the disputed land was in plaintiff, unless she is estopped by her acts respecting an agreement upon a line as incorporated in a deed made to a third party, Mrs. M., the latter of whom acted through her husband M., in its purchase. The evidence disclosed that M. and defendant agreed that a certain line should divide the *locus in quo* from the land to be conveyed by plaintiff to Mrs. M.; that the plaintiff was unaware of this agreement and took no part in it, and, further, was unaware at the time of the transaction that she owned the land now in dispute; that before she signed the deed to Mrs. M., M. told the plaintiff that he had agreed with defendant on a line between the two lots, and the agreement was referred to in the deed to his wife; that M., in his transactions with the defendant, did not act as the agent of the plaintiff or represent her: *Held*, there was no element of an equitable estoppel against plaintiff's claiming the land; (1) there was no evidence of any loss by defendant arising from the acts complained of; (2) M. and defendant attempted to change a line and not to determine upon and settle a disputed one; (3) there was not the element of intentional deception or fraud or conduct calculated to mislead defendant to his prejudice, indicated by the evidence as to plaintiff's acts, or any evidence of ratification by plaintiff of the acts of M. The principle of equitable estoppel discussed by WALKER, J.

4. **Evidence—Nonsuit—Defendant's Evidence.**

Evidence introduced by defendant cannot be considered for him on his motion to nonsuit the plaintiff upon the evidence, and it was reversible error for the trial judge to permit defendant to introduce a deed pertinent to the inquiry during the taking of plaintiff's testimony and consider it in granting defendant's motion.

APPEAL from *Ferguson, J.*, at September Term, 1910, of WARREN.

Action for the recovery of land. Defendant denied the plaintiff's ownership and set up an equitable estoppel, by which he says that, if he had not title to the land in dispute, he acquired it by the conduct of the plaintiff with reference to the location of a line between the said land which is claimed by him and that sold by plaintiff to Mrs. Mamie E. Miles. The defendant contended that the line between the disputed lot and the property sold was curved, extending from the southeast corner of the Presbyterian Church lot (at A on the map) to the northeast corner of the old peach orchard (A, B, C, on the map), and that when plaintiff sold to Mrs. Miles, the husband of the latter, T. J. Miles, acting for his wife, agreed with him that the line of divide between the two lots should be straightened, so that the line would extend in a straight course from


North
C
197 ft
308 ft
Old Peach Orchard
526 ft
B
98 ft
out house
Stables
lot in dispute
A
D
Conveyed to Presbyterian ch.
Hen house
Presbyterian ch. lot
212
Heptinstall lot
J. J. Stallings line 526 ft
155 ft
Halifax Street S. 83 E.

D to C. The deed from plaintiff to Mrs. Miles was made accordingly. Plaintiff was not present when T. J. Miles and defendant agreed upon the line, but she testified that T. J. Miles told her before she signed the deed, "that he had traded with defendant and agreed on a line between the lots, and that such new line was inserted in the deed," which contains the following clause: "Said northern line beginning at the northeast corner of the orchard and running north 78¼ west 308 feet 4 inches to the Presbyterian Church lot, is an agreed line by all parties interested. In the presence of." Plaintiff, in her own behalf, testified: "My aunt, Mrs. Heptinstall, died 12 December, 1909. Miss Person died in February following. I made sale to Mr. Miles about a month after her death. I paid Miss Blow the $1,000 provided in my aunt's will. I had no communication, written or oral, with defendant and did not authorize Mr. Miles to represent me in any transactions with him. When I went to Littleton to attend the sale of personal property of my aunt's estate, I had already bargained with Mr. Miles, but the papers had not been executed. There had been no controversy between defendant and myself respecting the ownership of property, and at the time I executed the deed to Mrs. Miles I had not learned that the property I am now suing for was embraced in the will, and was mine. I understood from Mr. Miles when I signed the deed that at an interview between him and defendant, at which I was not present, he had made a trade with the defendant, letting him have a few feet of land at the rear of the lot I sold him for a given number of feet claimed by the defendant at the front. I was leaving Littleton on the night train and signed the deed that night without reading it, but supposed it was all the same. I did not understand that I was signing away any rights except to the land I was selling Mr. Miles. I did not know that I had any more land than I was selling Mr. Miles. Mr. Miles sent me a bill for surveying the land and I paid it. I have not sold the lot I am now suing for. I was asked by Mr. Miles to go out there that morning. I went and stayed a little while and left for the house where the sale was going on. I did not send for the surveyor. I did not understand that I had anything to do with the running or fixing any line. My trade was made with Mr. Miles before that time. Mr. Miles afterwards sent me the surveyor's bill and I paid it. I had heard in my aunt's lifetime that she had been defrauded out of the lot now in suit. She was easy to influence and would not contend for her rights. Mr. Miles told me before I signed the deed that he had traded with the defendant and agreed on a line between the lots and that such agreed line was inserted in the deed, as now shown to the court."

T. J. Miles, witness for the plaintiff, testified: "I traded with Miss Boddie, plaintiff, by letter before any lines were established. She was in Littleton soon after Mrs. Heptinstall's death at a sale of the personal property of the estate. I think I took the deed from her before she left. I arranged to run line of the lot I was buying. Defendant was in possession, claiming the lot now in dispute, and I told him I was going there next morning to run the line, and wanted him to come, and he did so. Mr. Picot and Mr. Newsom came with the defendant and talked for him. I was acting entirely for myself in the matter and did not represent Miss Boddie. We found that a straight line continuing the Presbyterian Church line would strike the building already spoken of, and as the will called for the buildings with the house lot, we ran a diagonal line from the Presbyterian Church corner so as to strike the fence line north of the house. I agreed with the defendant that I would give him certain allowance of land at another point on the line if he would give me so many feet, 17 feet 4 inches, along the Presbyterian Church lot, running north, so as to make the line a square one instead of diagonal across the now disputed lot. The plaintiff was present when we were running the line, a little while, and left. I do not think she spoke to the defendant at all. She had nothing to do with my arrangement with the defendant. I was acting entirely on my own account with him without any authority from plaintiff and without her knowledge. I did not undertake to act for her. I had the deed from her to my wife prepared and she executed it." (Defendant here introduced the deed from plaintiff to Mrs. Miles referred to by the witness, and read from description, "N. 78½ W. 308 feet 4 inches to corner of Presbyterian Church lot . . . is an agreed line by all parties interested." Plaintiff objected to the introduction of the deed during the taking of her testimony, and excepted to the admission of it by the court.) "That clause in the deed was inserted by my direction. Defendant and I agreed on line and plaintiff had nothing to do with it. I had already bargained to buy the property I got. Plaintiff had nothing to do with the negotiation and did not authorize me to make any agreed line. She lived in Greensboro, and I don't know that she made any claim to the land now in controversy. She was not present when the survey was made. There was some controversy between plaintiff and Mr. Newsom. Halifax Street was not established until after Mr. Heptinstall's death. There was a path or driveway along there across his field in his lifetime." There was evidence that John W. Heptinstall at one time owned all the land and devised it by his will to his widow, Cornelia B. Heptinstall, who devised it to Mrs. Person for life, with remainder to the plaintiff. The life tenant died in February, 1910, and plaintiff shortly thereafter contracted to sell that part of the land designed on the map as the "Heptinstall lot" to Mrs. Miles, and the deed to her was executed on 24 March, 1910.

At the close of the testimony introduced by the plaintiff, the defendant not having offered any except the deed, the court ruled, "that the plaintiff was estopped to maintain her action by the recital in her deed to Mrs. Miles, to wit, 'that N. 78¼ W. 308 feet 4 inches to corner of Presbyterian Church lot is an agreed line by all parties interested. In the presence of,' and entered judgment of nonsuit." The plaintiff excepted and appealed.

J. H. Kerr, S. G. Daniel, and T. M. Pittman for plaintiff.
J. M. Picot and T. T. Hicks for defendant.

Walker, J., after stating the case: There is no sufficient evidence in the case to show that the defendant owned any part of the land, and unless the alleged equitable estoppel can be established, the plaintiff is entitled to recover the premises in dispute, provided the jury find that John W. Heptinstall was seized of them at the time of his death, as by his will and that of his widow and devisee they have been vested in the plaintiff. There was evidence tending to prove that he was the owner, which it is not necessary to set out. The material facts will be found in our statement of the case.

The doctrine of equitable estoppel has been thoroughly discussed and settled by the courts. What seems to be the best thought upon the subject may be thus expressed. Estoppel by misrepresentation, or equitable estoppel (which is estoppel *in pais*), grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of contract or of remedy. This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained. 16 Cyc., 722. It is called equitable estoppel because it arises upon facts which render its application in the protection of rights both equitable and just, but the doctrine is recognized in the courts of common law, although at first administered as a branch of equity jurisprudence. Coke refers to it in his commentaries. "Touching estoppels, which is an excellent and curious kind of learning, it is to be observed that there be three kinds of estoppels, viz.: by matter of record, by matter in writing, and by matter *in pais*." Coke Litt., 352a. In order to constitute an equitable estoppel, there must exist a false representation or concealment of material fact, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge, or, having the means of knowledge of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice. 16 Cyc., 722; Eaton's Equity, p. 169. It is a species of fraud which forms the basis of the doctrine, and to prevent its consummation is its object. What I knowingly induce my neighbor to regard as true is the truth as between us, if he has been misled to his injury by my asseveration or conduct. *Kirk v. Hamilton,* 102 U. S., 68; *Elec. Light Co. v. Bristol Gas Co.,* 99 Tenn., 371. Mr. Eaton, in his valuable treatise on Equity, at p. 169, states the constituent elements of a good equitable estoppel with fullness and accuracy, as follows:

"1. Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts.

"2. The party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue.

"3. The truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him.

"4. The party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel, or by the public generally.

"5. The representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel.

"6. The party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party be permitted to deny the truth thereof." To the same effect are Bigelow on Estoppel (5 Ed.), p. 26; Minor and Wurts on Real Property, sec. 1067, and note 13.

But how is this principle of law, which was intended to promote justice and fair dealing, applicable to the facts of this case? We do not see. The plaintiff says that she did not know of her title to the land in controversy at the time of the transaction between Miles and the defendant. She was not present and was ignorant of their arrangement as to the line until told of it by Miles, when she executed the deed to his wife. The defendant has not lost anything, nor has he been prejudiced in any degree by anything she said or did. He had nothing to lose, so far as the testimony shows. The land was not his, but hers, and how he can claim that he has been wronged by losing any land which he did not have to lose, we are at a loss to understand. How has he been damaged? His situation has not been changed for the worse. The parties were not even attempting to locate or settle the true position of a line which was in doubt, but to change a known and crooked line by substituting a straight one for it, which could not be done by parol. *Davidson v. Arledge,* 88 N. C., 326 (*s. c.,* 97 N. C., 172); *Reed v. Schenck,* 13 N. C., 415. The case does not fall within the rule as to lines run and marked for the purpose of fixing the boundaries to be inserted in a deed—the contemporaneous location of a line—for the case was not tried upon any such theory, but solely upon the idea of an equitable estoppel, and, besides, the defendant has shown no title to the *locus in quo,* unless the plaintiff has in some way been estopped to deny it. It was not a question of settling a boundary, but one of estoppel. The line was only established for the purpose of defining the boundaries of the land which the plaintiff had contracted to convey to Mrs. Miles. To estop the plaintiff by her conduct from asserting her legal rights to her property, there must have been intentional deception, or such gross or culpable negligence as to amount to constructive fraud. *Brant v. Virginia, etc., Co.,* 93 U. S., 326; *Henshaw v. Bissell,* 18 Wall., 255. T. J. Miles was not acting for the plaintiff, but for himself. He had no authority to act for her and she had nothing to do with the arrangement between him and the defendant. He so testifies; and as plaintiff was nonsuited, this evidence must be considered as true. In what way, therefore, has she been guilty of any fraudulent conduct? The line had been agreed upon and the transaction between Miles and defendant closed before she was ever informed of the fact. If defendant had, in a legal sense, been misled to his injury, it was done before she knew of it, and what she said or did afterwards had no influence upon him. It is perfectly apparent that she did not intend to deceive the defendant, for she was utterly ignorant of her true title to the *locus in quo,* and could not, therefore, have misrepresented anything to him in respect thereto. She knew nothing about the line, whether it was at one place or another, and was not particular as to its location. She merely supposed that the line had been fixed as the northern boundary of the land she was to convey to Mrs. Miles, and without reference to any disputed boundary between the tract so to be conveyed and land claimed, but, as it turns out, not owned by the defendant. She could not have intended to mislead him and thereby cause him to change his position or to act prejudicially to himself upon what she said or did, because she was not aware of any facts or circumstances which would induce her to believe that such a result would follow any conduct of hers. She was innocent of any wrongdoing and did nothing which bears any resemblance, in the slightest degree, to an estoppel, nor has the defendant been misled to his damage by any words or conduct of the plaintiff. *Estis v. Jackson,* 111 N. C., 145; *Lovelace v. Carpenter,* 115 N. C., 424. There must not only be fraud, or such culpable negligence as amounts to it in law, or a positive misrepresentation, but it must have been acted upon to the damage of the other party. "It is not enough that the representation has been barely acted upon; if still no substantial prejudice would result by admitting the party who made it to contradict it, he will not be estopped." Bigelow on Estoppel (5 Ed.), p. 644. "There can be no estoppel in equity, or in any principles of equity, unless the person who asks relief from the rigor of the law is a purchaser in the large and liberal sense in which the term includes all who have given value or changed their position for the worse in reliance on the act or declaration of others." Herman on Estoppel, sec. 797. "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and the latter was induced to act upon it, in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." *Ibid.*, sec. 759; *Rainey v. Hines,* 120 N. C., 376. It is said in Bispham on Equity (5 Ed.), sec. 282: "Equitable estoppel, or estoppel by conduct, has its foundation in the necessity of compelling the observance of good faith; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be an act of bad faith towards a person who had subsequently acquired the right. It is the presence of this bad faith, either in the intention of the party or by reason of the result which would be produced if he were permitted to deny the truth of his statement, that distinguishes this species of estoppel from estoppel at common law." It is further said that the assertion of an untruth may operate to estop a party from subsequently setting up the truth, and it is not necessary that the assertion should be willful. If innocently or mistakenly made, and yet the other party relied on it and acted upon it in a way to prejudice him if the truth is now permitted to be asserted, the party making the statement will be estopped by it. Sections 283 to 292. We are not dealing now with any such supposed case, and it is not necessary to discuss it. The plaintiff made no assertion or statement of fact which has misled the defendant. She has simply conveyed a part of her land to Mrs. Miles and fixed the northern line or boundary as set out in her deed, without having any transaction or communication with the defendant. It is, therefore, nothing but just that she be allowed to stand upon her right and assert her real title to the disputed land. The reference in the deed to the "northern line" as having been agreed upon by the interested parties must be restricted in its operation to her and Mrs. Miles—the only parties to the deed—and its effect, as to the defendant, is not extended beyond that produced by the other description in the deed. It works no estoppel and cannot be treated as a ratification. There is no room in this case for the contention that it amounts to either of these, so as to give the defendant any right to the land which he did not have before. If there is any estoppel, as between Mrs. Miles and the defendant, it could extend only to the small strips of land, one of which fell on his side of the line in straightening it, and for which he says that he gave up, in exchange, the other small part on her side of the line. But we have seen that the land alleged to have been thus exchanged did not belong to the defendant, as far as the case shows, and no conduct of Mrs. Miles, or her agent, could have the effect of impairing the plaintiff's right to her land. The court erred in holding that the plaintiff was estopped by any representation or conduct of hers.

The judge permitted the defendant to introduce the deed to Mrs. Miles during the taking of plaintiff's testimony and then entered a nonsuit upon it. This was irregular and should not have been allowed. The defendant's testimony could not be thus considered against the plaintiff in passing upon a motion to nonsuit. He is not entitled to judgment of nonsuit based upon testimony introduced by himself. *Brittain v. Westhall,* 135 N. C., 492; *Cotton v. R. R.,* 149 N. C., 227; *Morton v. Lumber Co.,* 152 N. C., 54.

The nonsuit will be set aside and a new trial granted.

Error.

D. F. WOOTEN v. JOHN L. BORDEN ET AL.

(Filed 22 March, 1911.)

Mortgagor and Mortgagee—Contracts—Private Sale—Purchaser—Purchase Price.

One who purchases land at a certain price, on which there was a mortgage, at a private sale from the mortgagee, who cancels his mortgage and thus gives a clear title to the land, is required to pay the price agreed upon without reference to any agreement between the mortgagor and mortgagee as to what part of the difference between the amount of the mortgage and the purchase price each was to receive; and the fact in this case, that the mortgagee, who negotiated the sale, received $200 more than his mortgage debt, has no bearing upon the matter.

APPEAL by plaintiff from *Justice, J.*, at January Special Term, 1911, of LENOIR.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

J. R. Wooten and Rouse & Land for plaintiff.

Loftin, Varser & Dawson for defendants.

CLARK, C. J. The plaintiff testified that there was an agreement between George Carter and the plaintiff by which Carter had authorized the plaintiff to sell the land at a price by which he, Carter, would get $750, and pay off a judgment on the land for $125, and that he (Wooten) could keep the balance, $2,250; that thus authorized, he contracted with the defendant to sell him the land at $3,125; that he made out the deed for the land, reciting that consideration, and talked the matter over with Borden and Carter; that at that interview Carter insisted on and obtained some further concessions as to the rent for that year (which is not material here), and thereupon Carter executed the deed and it was delivered to the defendant; that thereupon the defendant gave a check for the $125 judgment and $750 check to George Carter, but learning that the plaintiff's mortgage upon the land amounted to only $2,049, gave him a check only for that amount instead of the 2,250 which by virtue of the agreement with Carter the plaintiff was to receive. The plaintiff now claims the difference between the said $2,049 and $2,250, with interest thereon.

Upon this evidence his Honor directed a nonsuit to be entered. In this there was error. The evidence must be taken most strongly in favor of the plaintiff. According to that evidence, the money consideration to be paid by the defendant was $3,125. The plaintiff was the active party in making the sale. As the deed was duly executed by Carter and delivered with the cancellation of the mortgage, it was incumbent upon the defendant to pay over the entire $3,125. It was no concern of the defendant how Carter and the plaintiff should divide the proceeds between them. As between Carter and the plaintiff, the mortgage due the plaintiff was only $2,049, but according to plaintiff's evidence, which upon this motion must be taken as true, Carter agreed that the plaintiff should have $2,250 out of the proceeds of the sale. It is probable that the $201 above the amount of the mortgage was allowed the plaintiff by Carter for his services in making the sale. But however that may be, the testimony of the plaintiff is that Carter agreed that the plaintiff should have $2,250 and that he himself would be content with $750. The plaintiff testifies that he told the defendant that he was to have $2,250 out of the transaction under his agreement with Carter. The distribution of the purchase money was a matter between Carter and the plaintiff which in no wise concerns the defendant, who does not deny that he agreed to pay $3,125 for the land, of which $201 is still unpaid.

When the case goes back, the defendant, out of abundant caution, can, if he desires, have George Carter made a party to the action.

The judgment of nonsuit must be set aside.

New trial.

C. W. GRIFFIN v. J. E. LANE.

(Filed 22 March, 1911.)

Wills—Devises—Conditions—Age—Survivors—Limitations—Fee Simple.

A devise of land was to the daughters of the testator, to be divided off and set apart to each upon her attaining 21 years of age, with a proviso "that if any one or more of my daughters die before reaching that age without heir or heirs, such share or shares to be divided among my surviving daughters." A codicil to the will provided: "Should any one or more of my daughters die without bearing child or children, the portion of property left by her shall go to her surviving sisters": *Held*, the only restriction upon a daughter to make a valid fee-simple conveyance of her land devised was that she must have attained the age of 21.

APPEAL by plaintiff from *Ferguson, J.*, at Spring Term, 1910, of PERQUIMANS.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Charles Whedbee for plaintiff.

W. T. Shannonhouse and J. S. McNeider for defendant.

CLARK, C. J. In 1867 John Skinner died, leaving a will by which he devised all his property, of which the land in question is a part, to his five daughters, to be divided off and set apart to each as she should arrive at the age of 21, with a proviso that if any one or more of his daughters died before attaining the age of 21 and without heir or heirs, he gave such share or shares to be divided among his surviving daughters. In a codicil he provided: "Should any one or more of my daughters die without bearing child or children, the portion of property *left by her* shall go to her surviving sisters."

Each of the daughters reached the age of 21, and thereupon became vested with the absolute right to her share in fee simple, subject only to the provision in the codicil. That provision provides only for the restriction as to the property of any daughter *"left by her"* and when she shall die without bearing child or children. Martha, one of said daughters, contracted to convey the land in question to the defendant upon payment of the purchase money named. She tendered a fee-simple deed, and the only objection raised by the defendant to the title is on the ground of the restriction in the codicil. That provision, however, is no restriction upon the alienation by either daughter after arriving at 21 years of age. It merely provides that as to any daughter who should die, without bearing a child or children, the property left by her should go to her surviving sisters. Martha, therefore, had the full right to use, dispose of, or convey away the property, and could convey a fee simple to the defendant. *Herring v. Williams,* 153 N. C., 236.

Upon the case agreed judgment should have been entered in favor of the plaintiff.

Reversed.

JAMES B. ELKINS v. SAMUEL SEIGLER, JR.

(Filed 22 March, 1911.)

1. **Wills—Devises—Limitations—Conditions—Surviving Children—Deeds and Conveyances—Title—Defeasance.**

   Under a devise of a life estate in lands, with limitation over to L., and to "the child or children of her body," with proviso if L. "dies without leaving any children, then, and in no other case, to my lawful heirs," the fee simple vests in L., defeasible upon her dying without leaving a child, and L. cannot execute a good deed in fee simple.

2. **Deeds and Conveyances—Purchaser—Doubtful Title.**

   A purchaser of lands is not required to accept a doubtful title.

APPEAL by plaintiff from *Peebles, J.*, at January Term, 1911, of NEW HANOVER.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

S. M. Empie for plaintiff.
No counsel for defendant.

CLARK, C. J. This is an action submitted without controversy under Revisal, 803, to obtain the construction of the following item in the will of Mary W. Freeman: "I give and devise to my friend, Louis Chapman, for the term of his natural life, and after his death to Louisa Jones, and to the child or children of her body, forever: *Provided,* if the said Louisa Jones dies without leaving any children, then, and in no other case, to my lawful heirs, all my real estate," etc., etc.

Mary W. Freeman died 3 November, 1894, and Louis Chapman died in 1901. Louisa Jones at the death of Mary Freeman was single. In November, 1894, she married James B. Elkins and has never had any children. She contracted to deliver to the defendant a fee-simple deed for the land in question in consideration of the sum of $600. She has tendered a fee-simple deed in warranty. The defendant declined to accept the deed and pay the purchase money, on the ground that the plaintiff could not execute a good deed in fee simple. His Honor properly so held, and rendered judgment against the plaintiff.

The point here presented was decided in *Whitfield v. Garris,* 131 N. C., 148, and on rehearing was reaffirmed in an opinion by *Walker, J.,* with a wealth of authority and force of reasoning which leaves nothing to be added. 134 N. C., 24. It was held that such devise vests a fee simple in the devisee, defeasible upon her dying without leaving a child. This case has been cited and approved, *Cheek v. Walker,* 138 N. C., 449; *Anderson v. Wilkins,* 142 N. C., 161; *Harrell v. Hagan,* 147 N. C., 113; *Dawson v. Ennett,* 151 N. C., 545.

It is true, as contended by the plaintiff, that if Louisa Elkins had children living at the death of the testator she and the children would have taken as tenants in common, and that if she had no children at that time she would have taken a fee simple (*Silliman v. Whitaker,* 119 N. C., 89), as plaintiff's counsel contends. But his argument leaves out of consideration a material fact, that under the terms of this will it is a fee simple defeasible if said Louisa should die without leaving a child. A purchaser is never required to accept a doubtful title. *Batchelor v. Macon,* 67 N. C., 181.

Affirmed.

H. E. BONITZ v. BOARD OF TRUSTEES OF AHOSKIE SCHOOL DISTRICT, No. 11.

(Filed 22 March, 1911.)

1. **Schools—Races—Discrimination—Constitutional Law—Provisions Mandatory.**

The constitutional provisions for a uniform system of public schools, and that the children of the white and colored races shall be taught in separate schools without "discrimination in favor of or to the prejudice of either race," are mandatory, and may be disregarded neither by legislatures nor officials charged with the duty of administering a given law. Constitution of N. C., Art. XIV, sec. 2.

2. Same.

An act of the Legislature designating a certain boundary "as a school district for the white race," requiring by construction that the funds to be raised under its provisions shall exclusively apply to the white schools within its boundary and the additional facilities afforded shall only be enjoyed by the white children attending the schools, is unconstitutional. Constitution of N. C., Art. XIV, sec. 2.

3. Legislative Acts—Courts—Interpretation—Constitutional Law.

Courts will not adjudge an act of the Legislature invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable.

4. Same.

Between two permissible interpretations of a statute with reference to the Constitution, the one should always be adopted which upholds the law.

5. Same—Schools—Taxation—Bond Issues—Races—Discrimination.

When a legislative enactment clearly indicates that its controlling purpose and, in several places, its expressed intent is to establish a special taxing district for the purpose, by an increase of taxation and an issue of bonds, of affording additional school facilities within the prescribed district, the beneficent purpose of the act will not be frustrated because, in one of the sections, it is designated as a "school district for the white race."

6. Same—Application of Funds.

Chapter 210, Laws 1909, entitled an act to incorporate a certain school district and allow it to vote on a special tax for schools and to issue bonds, in the body of the act clearly defined the boundaries of the district, provided for taking a vote upon the questions of special taxation and the issuance of the bonds and for the application of the moneys derived to the building and equipping of suitable buildings, and "for such other purposes as the trustees may order"; also, that the amounts coming from the special tax shall be paid by the proper officers to the board of trustees, to be by them used "for the benefit of the public schools of the district." The questions of taxation and bonds were duly acted on and approved by the people of the district: *Held*, (1) a designation in one of the sections of the act that the district was "for the white race" should be disregarded, and the constitutionality of the act upheld; (2) upon the facts in this case there is nothing to show that the proceeds of the bond issue, or the portion involved, may not be applied as directed by the act. *Lowery v. School Committee*, 140 N. C., 33, and *Smith v. School Trustees*, 141 N. C., 143, cited and approved.

APPEAL from HERTFORD, heard on case agreed, by consent, before *J. S. Adams, J.,* 13 February, 1911, at Warrenton.

The facts stated in the case on appeal are as follows:

1. The General Assembly of North Carolina at its session of 1909 passed an act entitled "An act to incorporate Ahoskie School District and allow it to vote on a special tax for schools and issue bonds," which is chapter 210 of the Private Laws of 1909.

2. That on 4 May, 1909, an election was held in said school district as provided for in said act, and the question "For School Tax" and "Against School Tax" was submitted to the qualified voters of said school district, as directed by said act, and at said election a majority of the qualified voters of said district voted "For School Tax." The result of said election was duly declared as directed by the provisions of said act.

3. That at said election the question of issuing bonds under the provisions of said act was also submitted to the qualified voters of Ahoskie Graded-school District.

4. That said election was held and conducted as provided for in said act, and a majority of the qualified voters of said district voted ballots with the word "Approved" written or printed thereon.

5. That the result of said election was declared and certified as required by said act.

6. That thereafter the bonds of said district were duly issued and executed, as provided for in said act, to the amount of $8,000, and are now under the control of said board of trustees.

7. That on .. day of June, 1910, said board of trustees contracted with said H. E. Bonitz to construct and build in said school district at Ahoskie a graded-school building at a cost of about $8,000, for which said Bonitz agreed to accept in part payment a portion of said bonds, provided they were valid and binding.

8. That said Bonitz has nearly completed said building, and is demanding of said trustees payment for his said work, but declines to accept any of said bonds, as he is advised and believes that they are not valid and binding, for the reason that said act is unconstitutional and void, but that he is willing to

accept a portion of said bonds in part payment of his said work, provided the court decides that said act is constitutional and said bonds are valid and binding.

9. The defendants are ready, willing, and able to deliver to plaintiff $4,000 of said bonds in part payment of his said work under their contract.

10. That none of the admissions herein contained are in any wise to affect either party or to be regarded as made except for the purpose of this submission of this controversy.

11. The questions submitted to the court upon this case are as follows:

First. Is said act, chapter 210 of the Private Laws of 1909, constitutional?

Second. Are said bonds issued under said act, as therein directed, valid and binding?

If said questions are answered in the affirmative, then judgment shall be rendered that said bonds are valid and binding, and that the plaintiff is compelled to accept a portion of said bonds in part payment of his contract price for erecting said school building when tendered by said board of trustees. If answered in the negative, then judgment is to be rendered that the plaintiff is not bound to accept any part of said bonds in payment of his contract.

On these facts, the court, being of opinion that the act was unconstitutional and the bonds were void, gave judgment for plaintiff, and defendant excepted and appealed.

F. W. Bonitz for plaintiff.
Winborne & Winborne for defendant.

HOKE, J. The Constitution of this State, Art. IX, sec. 2, in providing for a "uniform system of public schools wherein tuition shall be free of charge to all the children of the State between the ages of 6 and 21 years," contains the requirement, "That the children of the white race and the children of the colored race shall be taught in separate schools," and further, "but there shall be no discrimination in favor of or to the prejudice of either race." In numerous and well-considered decisions this Court has held that these provisions of our Constitution, in regard to the two races, are mandatory, and may be disregarded neither by legislatures nor by officials charged with the duty of administering a given law. *Smith v. School Trustees,* 141 N. C., pp. 143-159; *Lowery v. School Trustees,* 140 N. C., 33; *Puitt v. Comrs.,* 94 N. C., 709; *Riggsbee v. Durham,* 94 N. C., 800. If, therefore, the act in question here, in designating a certain boundary as a "school district for the white race," can only be construed as requiring that the funds to be raised under its provisions should be applied exclusively to the white schools within such boundary and the additional facilities afforded only enjoyed by the white children attending such schools, it would be clearly unconstitutional; but, in our opinion, such is not the necessary nor proper construction of the act. It is a well-recognized principle of statutory construction that "A court will not adjudge an act of the Legislature invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable." Black Court Law, p. 61. And that as between two permissible interpretations, that should always be adopted which will uphold the law. "That construction of a statute should be adopted which, without doing violence to the fair meaning of the words used, brings it into harmony with the Constitution." *Grenada County Supervisors v. Brogden,* 112 U. S., 261. In Black on Interpretation of Laws, p. 93, it is said: "Every act of the Legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favor of the validity of the act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality." And again, in same work, pp. 93 and 94: "Hence it follows that the courts will not so construe the law as to make it conflict with the Constitution, but will rather put such an interpretation upon it as will avoid conflict with the Constitution and give it full force and effect, if this can be done without extravagance. If there is doubt or uncertainty as to the meaning of the Legislature, if the words or provisions of the statute are obscure or if the enactment is fairly susceptible of two or more constructions, that interpretation will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed." These principles were fully approved and applied in *Lowery's case, supra,* in which an act to establish a graded school for the town of Kernersville was upheld and the officials required to afford equal facilities thereunder for both races, though in several features of the act indication was given that only white children were to be provided for; these last being rejected because in conflict with the constitutional provision, and the officials were directed to organize and administer the school in accordance with the valid portions of the law. In that case and on the question we are now discussing, it was held as follows:

"9. In executing the law, the defendants shall not discriminate against either race, but shall afford to each equal facilities. It is not intended by this that the taxes are to be apportioned between the races per capita, but that the school term shall be of the same length during the school year, and that a sufficient number of competent teachers shall be employed at such prices as the board may deem proper. *Dictum* in *Hooker v. Greenville,* 130 N. C., 473, disapproved.

"10. If the defendant board or its successor shall refuse to establish and maintain the school upon a constitutional basis and in accordance with the constitutional provisions, the courts have power, by the writ of mandamus, to compel them to do so.

"11. The two essential principles underlying the establishment and maintenance of the public school system of this State are: First, the two races must be taught in separate schools, and, second, there must be no discrimination for or against either race. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for that purpose."

The act before us (chapter 210, Laws 1909) is entitled "An act to incorporate the Ahoskie School District and allow it to vote on a special tax for schools and to issue bonds," and in the body of the act it is designated as "Ahoskie School District, No. 11." Then follows a description of the district by clearly defined boundaries, designating it as "a school district for the white race." Elaborate and specific provisions are then made for taking a vote of the district on the question of a special tax, and a separate and distinct provision for taking the sense of the voters as to the issue of bonds. Both of these provisions have been acted on, the tax voted and the bond issue approved. Section 9 provides, "That the money arising from the sale of bonds shall be used for purchasing a site and erecting suitable buildings and in furnishing necessary equipment for a graded school in such district," . . . "and for such other school purposes as the trustees may order." Sections 3 and 15 provide, "That all public school funds derived from the State and county, together with the amounts coming from the special tax above provided for, shall be, by the proper officers, paid to the board of trustees as herein provided for, and shall by them be used for the benefit of the *schools of said district.*" A perusal of the act gives clear indication that its controlling purpose and, in several places, its expressed intent is to establish a special taxing district for the purpose, by an increase of taxation and issue of bonds, of affording additional educational facilities within the prescribed district, legislation directly approved and sustained in *Smith v. Trustees,* 141 N. C., *supra,* and in *Perry v. Comrs.,* 148 N. C., 521, and this beneficent purpose should not be frustrated because, in one of the sections, it is designated as a "school district for the white race." In view of the authorities cited and the principles upon which they rest, the correct construction of the statute is to uphold it in its principal purpose and declare, as we do, that, disregarding this special feature of the act, contrary, as it is, to our Constitution, the money raised by taxation and by the issue and sale of bonds shall constitute a fund applicable to the school work of the district, to be administered according to law and having full regard to the constitutional provisions bearing upon it. Speaking to this question, the proper administration of a school fund, in *Smith v. School Trustees, supra,* the Court, after quoting with approval from *Lowery's case, supra,* said: "And from this it follows that the discretion conferred upon the defendants by the terms of section 12 is by no means an arbitrary one, but the same must be used as directed and required by the Constitution and in the light of the above decision. There are no facts or data given by which the Court may determine whether the contemplated expenditure is or is not an unequal and unlawful disbursement of the school funds. The defendants in their sworn answer aver that they have no desire or intent but to administer their trust in accordance with the law of the land, and it is right that we should act upon this statement till the contrary is made to appear by proceedings duly entered. . . . If defendants, contrary to their avowed purpose, shall endeavor to exercise the authority conferred upon them with 'an evil eye and unequal hand' so as to practically make unjust discrimination between the races in the school facilities afforded, it is open to the parties who may be interested in the question, by proper action, to correct the abuse and enforce compliance with the law." The proper application of this fund, however, is not now before us, except to say that, so far as the facts now appear, there is nothing to show that the proceeds of the bond issue, or in any event the portion thereof involved in this suit, may not be applied as directed by the act. The only question presented on this appeal is on the validity of the bonds, and, being of opinion, for the reason stated, that the proposed issue is lawful, we hold that the plaintiff is not justified in refusing to accept the bonds, and that on the case agreed judgment should be entered for the defendant.

Reversed.

B. F. WYNN AND WIFE *v.* ROBERT BULLOCK.

(Filed 22 March, 1911.)

1. **Reference—Exceptions—Acquiescence.**

Upon a judgment establishing the right of one of the contesting parties as a tenant in common of lands, an exception to the order of reference of the cause to the clerk to take and state an account of the rents and profits, with a demand for a jury trial, comes too late, as by not excepting at the time of the order the party is deemed to have acquiesced therein.

2. **Reference—Evidence—Judgment—Appeal and Error.**
   Exceptions to the findings of fact by a referee, with evidence to support them, approved by the trial judge, are not reviewable on appeal.

APPEAL from *Peebles, J.*, at December Term, 1910, of MARTIN.

Appeal by defendant from an order confirming the report of a referee.

Martin & Critcher and Winston & Matthews for plaintiff.
A. R. Dunning for defendant.

BROWN, J. This is a petition for partition in which defendant pleaded sole seizin. The defendant was adjudged to be a tenant in common with the *feme* plaintiff.

The presiding judge rendered judgment establishing the *feme* plaintiff's title to an undivided half interest in the land and referred the cause to the clerk to take and state an account of the rents and profits. Upon the coming in of the report the defendant filed exceptions and demanded a jury trial. The court overruled his exceptions and confirmed the report.

We are unable to find in the record an exception noted at the time to the order of reference made at March Term, 1910. In the absence of such exception the defendant is taken to have acquiesced in the order and is not entitled to a jury trial. *Driller Co. v. Worth,* 117 N. C., 520; *Roughton v. Sawyer,* 144 N. C., 766.

The other exceptions relate to findings of fact. As they were adopted and approved by the Superior Court and there is evidence to support them, we cannot review them.

The conclusion of law and judgment necessarily follows from the finding of facts. The judgment is

Affirmed.

HELEN L. MAGUIRE v. S. A. L. RAILROAD.

(Filed 22 March, 1911.)

1. **Railroads—Negligent Burning—Right of Way—Combustible Material—Causa Causans—Burden of Proof.**

To recover damages of a railroad company for carelessly and negligently communicating fire to its right of way which spread to and burned plaintiff's lands, the burden of proof is on plaintiff to show that defendant negligently permitted combustible matter to accumulate on its right of way and that defendant communicated fire from its engine to its foul right of way and from thence it was communicated to plaintiff's land and caused the injury.

2. **Railroads—Negligence—Right of Way—Foul Condition—Fire—Duties.**

It is only the duty of a railroad company with respect to its right of way to keep its roadbed and track and a reasonable distance on its right of way clear of such substances as are liable to be ignited by sparks or cinders from its engine.

3. **Same—Evidence—Nonsuit.**

In an action for damages to plaintiff's land alleged to have been caused by fire communicated to its foul right of way and from thence to plaintiff's land, there was evidence tending to show that when first discovered the fire was burning down the county road, off the right of way, and 100 yards from the railroad; that on the right of way, which had been burned over, from 30 to 50 feet from the track, there were "chunks" smoking as if they had just been burned, with no evidence to indicate the character of the "chunks," or that they constituted combustible material, and nothing to indicate that the fire originated there: *Held*, evidence insufficient, and a judgment of nonsuit upon defendant's motion should have been allowed.

4. **Same—Causa Causans.**

For the plaintiff to recover damages by fire communicated to his land alleged by reason of the foul condition of defendant's right of way, the mere fact that the defendant's engine passed more than two hours before a fire was discovered off the right of way is insufficient evidence to be submitted to the jury upon the question of whether the defendant's engine had caused it, there being no evidence to show that a fire was not there before the engine passed or as to the character and direction of the wind, or that the engine was throwing sparks when it passed.

5. Evidence—Conjecture—Nonsuit.

When the evidence raises no more than a mere conjecture as to defendant's negligence, it is error to submit the case to the jury.

CLARK, C. J., and HOKE, J., concur in the result.

APPEAL from *Ferguson, J.*, at August Term, 1910, of HALIFAX.

Civil action to recover damages for setting fire to and burning plaintiff's land. These issues were submitted:

1. Was the land of the plaintiff damaged by a fire set out by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

Then followed issue as to damage.

From a judgment for plaintiff, defendant appealed.

No counsel for plaintiff.
Murray Allen for defendant.

BROWN, J. The plaintiff alleges that the right of way of defendant was in a very foul condition, and that on a certain day in December, 1909, the defendant negligently and carelessly communicated fire to its right of way, which spread to and burned plaintiff's lands.

The assignments of error present the question as to the sufficiency of the evidence upon the first issue.

The plaintiff's witness, C. K. Harvell, testified that he passed the land in question between half-past 7 and 8 o'clock on the morning of the fire and noticed that the fire had burned up along the county road, which crosses the railroad at that point, for a distance of 100 yards; that he saw effects of the fire 25 yards from the railroad and it was still burning in a reedy marsh; that the right of way at that time had been "burned off."

James Keeter, another witness, testified in behalf of plaintiff that he saw this land on the day of the fire; that "the right of way was burned off and on the right of way, 30, 40, or 50 feet from the track, were chunks smoking as if just burned"; that the fire was burning up the county road. There was also evidence to the effect that the trees on plaintiff's land were burned worse on the side toward the railroad than on the opposite side. This, together with an admission by the defendant that one of its trains passed this point between 5 and 5:30 o'clock on the morning the fire was alleged to have occurred, constitute all the evidence offered by plaintiff upon the first issue.

The plaintiff certainly derived no support from the defendant's evidence, which offered the evidence of its section foreman to show that the right of way was clean at the time of this fire, and introduced a number of witnesses who testified that there was a fire in these woods on Sunday morning, the time set out in the complaint, and that there was only one fire in there in the fall of 1909, when the fire is alleged to have occurred. These witnesses testified that the fire seen by them on Sunday started at a point some distance from the railroad and burned towards the railroad.

The burden rested upon the plaintiff to establish by competent evidence two facts alleged in her complaint: first, that the defendant negligently permitted combustible matter to accumulate on its right of way, and, second, that the defendant communicated fire from its engine to its foul right of way, which fire was thence communicated to the lands of the plaintiff. Measured by the standard fixed by the decisions of this Court, we think the plaintiff has failed to offer evidence sufficient to be submitted to the jury in support of either of these essential facts. *Crenshaw v. St. Ry.*, 144 N. C., 321; *S. v. Vinson*, 63 N. C., 335; *Young v. R. R.*, 116 N. C., 932.

Applying this principle in an action for injury resulting from fire alleged to have been negligently set out by a railroad, this Court says: "Where plaintiff alleges that he has been injured by fire originating from sparks issued from defendant's locomotive, he must not only prove that the fire might have proceeded from the defendant's locomotive, but must show by reasonable affirmative evidence that it did so originate." *Ice Co. v. R. R.*, 122 N. C., 881; *R. R. v. Edmonson*, 101 Ga., 747.

In support of the allegation that defendant's right of way was in foul and negligent condition, plaintiff offered evidence that the fire when discovered was burning down the county road, off the right of way and 100 yards from the railroad; that on the right of way, 30, 40, or 50 feet from the track, there were chunks smoking as if just burned, and the right of way was "burned off." There was nothing in the evidence to indicate the character of the "chunks." No evidence was offered to show that the fire originated at the point where the chunks were burning, nor was there any evidence that they were of such an inflammable character as to constitute combustible material as that term is used in describing the condition of a railroad right of way. The mere fact that the right of way had been burned off does not show that the defendant permitted combustible material to accumulate thereon. It is only the duty of a railroad company to keep its roadbed and track and a reasonable distance on its right of way "clear of such substances as are liable to be ignited by sparks or cinders from its engines." *Black v. R. R.,* 115 N. C., 667; *McCoy v. R. R.,* 142 N. C., 383.

An examination of the cases in which recovery has been sustained upon the ground that the defendant's right of way was in a foul and negligent condition will show that there was evidence of an accumulation of combustible matter; that bushes had been cut down and allowed to remain on the right of way, and evidence of a similar character. *Black v. R. R., supra; Simpson v. Lumber Co.,* 133 N. C., 95; *Livermon v. R. R.,* 131 N. C., 527.

The burden rested upon the plaintiff to show, not merely that the right of way was in a foul condition, but that the fire started on such foul right of way and was set out by the defendant's engine. In *Black's case, supra,* the following language was used in charging the jury: "You must first ascertain whether or not the fire was occasioned by fire or sparks from the engine. The burden of proof is on the plaintiff to show this. If the plaintiff has not shown it, that ends the case, and you should answer the first issue 'No.' If you find the fire was occasioned by fire or sparks from the engine, then you must go on further and inquire whether or not the defendant company has been negligent and whether or not the damage to the plaintiff has been proximately caused by such negligence. If so, you should answer the first issue 'Yes.'" On appeal, this instruction was approved.

The question for our determination on the second branch of the case is this: Is the admitted fact that an engine passed a point more than two hours before a fire was discovered sufficient evidence to be submitted to the jury in support of an allegation that the fire was caused by the passing engine? It will be observed that the evidence does not show that the engine was throwing sparks when it passed this point two hours before. The evidence fails to show that no fire was there before the engine passed, and there is no evidence in the record as to the character and direction of the wind. In our opinion, the evidence raises no more than the merest conjecture that this fire was set out by the defendant's engine, and his Honor erred in submitting it to the jury. In cases of this character there must be some evidence that connects the origin of the fire with sparks or cinders from the engine. *Armstrong v. R. R.,* 130 N. C., 64; see, also, *Johnson v. R. R.,* 149 N. C., 581.

In a similar case the Missouri Court of Appeals says: "The court was left entirely in the dark as to how long the fire had been burning when the freight train passed that point. The burden of proof rested on the plaintiff to make out his case. There was no evidence to the effect that just before the passing of the defendant's engine no fire was seen at that point by a person having an opportunity to see it. Nor was there any evidence that immediately after the train passed the fire appeared on the track." *Peck v. R. R.,* 31 Mo. App., 123.

There was every opportunity for this fire to have originated from some other source as well as from defendant's engine. All that can be reasonably said is that the fire *may* possibly have been set out by the engine, and it is equally true that it may not. As was said in *Peffer v. R. R.* (Mo.), 71 S. W., 107, in which the evidence that the fire was set out by the defendant was much stronger than in the present case, "The truth is in such doubt as that to say one way or the other is no more than guessing."

In the view we take of this case, it is unnecessary to consider defendant's exceptions to the judge's charge. We are of opinion that the action should have been dismissed upon defendant's motion for judgment of nonsuit. It is so ordered.

Reversed.

CLARK, C. J., and HOKE, J., concur in result.

W. C. KORNEGAY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 March, 1911.)

1. **Railroads—Negligence—Burning—Evidence—Nonsuit.**

In an action to recover damages for the destruction of plaintiff's residence, alleged to have been caused by fire communicated to the house, which was situated near the defendant's right of way, by sparks from defendant's passing engine, there was evidence tending to show that no fire was within the house which could have caused the damage; that plaintiff and his family, between midnight and 2 o'clock A. M., stood on his front porch and watched the defendant's train pass, and the engine was throwing sparks from its smokestack in great quantities, with the wind blowing from that direction toward the house, which was enveloped by sparks; that soon after plaintiff and his family retired he was awakened by noises which proved to come from his burning house, which was completely destroyed, and that day broke about two hours after the fire was over. There was evidence in defendant's behalf tending to show that its engine was equipped with the best approved type of spark arrester in general use, and that no sparks were emitted from its engine: *Held*, approving the rule that the evidence must be construed in the most favorable light to the plaintiff, when a motion to nonsuit is made, that the plaintiff had made out a *prima facie* case, and was entitled to go to the jury upon the issue as to defendant's negligence.

2. Instructions, How Construed—Correct as a Whole.

The charge of the court to the jury must be considered as a whole and not disconnectedly, and each instruction must be construed with reference to what preceded and followed it; and when the charge as thus viewed is correct, detached portions thereof, even in themselves subject to criticism, do not constitute reversible error.

3. Same—Railroads—Negligence—Burning—Evidence.

In an action against a railroad company to recover damages for burning the plaintiff's house, alleged to have been negligently caused by sparks from the defendant's engine, the judge correctly instructed the jury, in substance, that if the house caught fire from sparks which were emitted from the engine, it made out a *prima facie* case of negligence, but they would not find against the defendant upon the issue if they concluded, after consideration of all the proof, that the defendant's engine had a spark arrester, not the best, but of approved make and in general use, and that the train was carefully handled, so that there was no negligence on the defendant's part.

4. Evidence—Irrelevant Questions—Harmless Error.

During the examination of the plaintiff in this case an inquiry by the court, "You had a pretty big piazza, didn't you?" was held irrelevant and harmless, the action being to recover damages of the defendant railroad company for negligently setting fire to and destroying plaintiff's house by sparks from its locomotive.

5. Same—Railroads—Burning.

On the question of defendant's negligence in permitting sparks from its engine to set fire to and destroy plaintiff's house, the defendant's counsel asked a witness where the engineer was when he last heard from him, and the question was excluded: *Held*, the inquiry was irrelevant, no other evidence appearing to make it competent.

APPEAL from *Cooke, J.*, at October Term, 1910, of WAYNE.

Action to recover damages for setting fire to plaintiff's house and destroying the same and a part of its contents. So much of the plaintiff's own testimony as is necessary to show the origin of the fire was as follows:

"On 23 October, 1907, John H. Sparks' show train was pulling out of Mount Olive to go to Clinton. I was out on my piazza with my family, viewing the train as it passed our house. Sparks in great quantities were being emitted from the smokestack of the engine pulling that train of cars. My house was situated on the east side of the railroad, and the course the wind was blowing was from the northwest, coming directly across the railroad towards my house and conveying the sparks in great quantities over the house and at random, it seemed to me, everywhere else. That was somewhere between 12 and 2 o'clock at night. We went to bed as soon as the train passed. I went to sleep; my wife roused me and said there was a noise somewhere. On being aroused, I heard a noise of something breaking or something falling; I then went out in the hall to get my gun, but did not get it; on getting in the hall and looking through the transom over the front door it looked very red, but I still heard the noise which seemed to be overhead; I then opened the front door facing the railroad, and I saw the light from fire. I rushed out on the railroad right of way. The fire was burning on the roof of my house, and it was falling in. I rushed in and told my wife the fire was burning the roof of the house, to get up at once, which she did. There was no evidence of fire anywhere on the inside of the house, either downstairs or upstairs. There were two double chimneys to the house, containing six fireplaces, but there had been no fire in the house for two days. The kitchen was at the rear of the house, a single room 10 x 12 feet and 9 foot pitch, and we had not cooked in the stove nor had any fire in the kitchen since 6 that morning. We had spent the entire day in the show grounds and in the shows. The house was consumed and (nearly) all the furniture. . . . There was no fire in the kitchen when I first discovered it. The fire was confined to the front part of the roof of the main house. . . . I had not been asleep very long when fire broke out. Day broke about two hours after the fire was over. It appeared to be between 1 and 3 o'clock when fire was first discovered."

There was other evidence tending to show that the fire was caused by sparks emitted from the smokestack of the defendant's locomotive engine. There also was evidence, on the part of the defendant, that the engine had a spark arrester in good condition and of the best approved type in common or general use, and that no sparks were emitted from the engine as it passed near the plaintiff's house. The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

J. D. Langston and W. T. Dortch for plaintiff.
W. C. Monroe for defendant.

WALKER, J., after stating the case: The defendant's motion for a nonsuit was properly overruled. There was sufficient evidence tending to show that the fire was caused by sparks emitted from the defendant's engine. The plaintiff's own testimony, and there was more of the same kind, warranted the jury in finding, as a fact, that the house was set on fire in that way. If we construe the evidence in the most favorable light for the plaintiff, giving him the benefit of all legitimate and reasonable inferences to be drawn therefrom, as we are required to do (*Cotton v. R. R.*, 149 N. C., 227; *Freeman v. Brown,* 151 N. C., 111), the evidence is quite as strong as that which was held sufficient in *Deppe v. R. R.,* 152 N. C., 80, a case much like this one in its facts and circumstances.

When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff made out a *prima facie* case, entitling him to have the issue as to negligence submitted to the jury, and they were justified in finding negligence unless they were satisfied, upon all the evidence in the case, that, in fact, there was no negligence, but that the defendant's engine was equipped with a proper spark arrester and had been operated in a careful or prudent manner. *Williams v. R. R.,* 140 N. C., 623; *Cox v. R. R.,* 149 N. C., 117.

The charge of the court, when properly considered as a whole, was in accordance with the principles settled in the cases just cited. We are not permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with the other portions of the charge, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be construed with reference to what precedes and follows it. This rule is so plainly fair and just, both to the judge and the parties, as to have commended itself to the courts, and it is the only reasonable one to adopt. *S. v. Exum,* 138 N. C., 599; *S. v. Lewis* (at this term). In *S. v. Exum, supra, Justice Hoke,* approving the statement of the rule to be found in Thompson on Trials, sec. 2407, says: "It (the charge) is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." Apply this rule to the charge of the court, and we think it will be gathered therefrom that his Honor substantially told the jury that if the house caught fire from sparks which were emitted from the defendant's engine, it made out a *prima facie* case of negligence; but they would not find against the defendant upon the issue if they concluded, after consideration of all the proof, that the defendant's engine had a spark arrester—not the best, but of approved make and in general use—and that the train was carefully handled, so that there was no negligence on the defendant's part. The court did not say that the mere emission of sparks, even if they started the conflagration, would establish the liability of the defendant for the consequent damage, but the careless emission of sparks, whether they proceeded from a defective spark arrester or from the unskillful or negligent operation of the engine. *Deppe v. R. R.,* 152 N. C., at page 83.

The plaintiff testified that he and his wife were sitting on the piazza of his house when the train passed. He was describing the piazza, when the court inquired: "You had a pretty big piazza, didn't you?" No objection was made to the remark at the time, but defendant afterwards assigned it as error. The plaintiff contends that if the remark was injurious to the defendant, the objection came too late, and cites *Alley v. Howell,* 141 N. C., 113; *S. v. Tyson,* 133 N. C., 692; but we need not consider this contention, as we are of the opinion that the inquiry, if not proper, was harmless. It was not relevant to the controversy in any way. What could the size or dimensions of the porch have to do with the negligence of the defendant or the question being tried? It was not prejudicial in any view that we can take of the case. The defendant's counsel asked a witness where the engineer was when he last heard from him, and the question was excluded. It does not appear that any effort had been made to procure the attendance of the engineer as a witness, by issuing a subpœna for him or by taking his deposition. The inquiry as to his whereabouts was, therefore, irrelevant. For all that appears, the defendant could easily have had the benefit of the engineer's testimony if wanted. It was not proposed to show that he was dead, or that the defendant could not reach him with process or take his deposition. If that was the object, it should have been disclosed to the court, as otherwise it could not be material where he was.

We find no error in the case.

No error.

W. B. FLANNER, ADMINISTRATOR, v. KINSTON COTTON MILLS.

(Filed 22 March, 1911.)

1. **Master and Servant—Independent Duty to Servant—Contributory Negligence—Proximate Cause—Issues.**

   Where a negligent default has been established against an employer by reason of some breach of an arbitrary and independent duty which he owes to his employee, as in failure to supply "machinery known and approved and in general use," a disobedience of instructions on the part of the employee and its effects are to be considered and determined, as a rule, on the issue as to contributory negligence,. involving also the question of whether such disobedience is the proximate cause of a given injury.

2. **Same—Ordinary Work—Instructions—Disobedience—Negligence.**

   Where no breach of an arbitrary or independent duty of an employer to his employee is shown, and the former, having the latter to do an ordinary piece of work, gives him instructions concerning it which provide and afford a simple and safe method of doing the work, his instructions may also be considered in reference to his responsibility on the first issue, as to his negligence; and if it is shown that conditions have been changed and work of the kind indicated rendered dangerous by reason of the employee's willful disobedience, that the employer did not approve or encourage, no responsibility should attach to him; and this position, as a rule, is not affected by the view the employee may take of his surroundings.

3. **Same—Evidence—Instructions.**

The plaintiff was employed by the defendant to dig in a sand pit 13 feet long, 8 feet wide at the top and 8 feet deep. There was evidence for defendant tending to show that there was no danger in digging in the pit if the sides were "flammed" or sloped, and that in violation of instructions the plaintiff continued to dig straight down or undermine the side, and in consequence it caved in on him to his injury: *Held correct*, an instruction tendered by defendant in substance, that if they believed the evidence of defendant they should answer the first issue, as to defendant's negligence, "No"; and it was error to so modify the instruction as to make their answer to the issue depend upon whether the plaintiff, while in the pit, could see and appreciate his surroundings when digging in disobedience to his instructions.

APPEAL from *Ward, J.*, at November Term, 1910, of CRAVEN.

Civil action. There was evidence on the part of plaintiff tending to show that in July, 1908, plaintiff's intestate was killed by the caving in of a sand pit in which he was working as an employee of defendant; that this pit had been sunk by intestate, working with others, on the premises of defendant company for the purpose of procuring sand to make the brick for a smokestack which defendant intended to build, and at the time of the occurrence was about 13 feet long, 8 feet wide at the top and on an average of 8½ or 9 feet in depth; that the soil was sandy, showing a decided tendency to cave, and that it was negligence on the part of the company to direct or allow its employees to work in the pit without having the same shored or braced in some way to hold the sides in place.

The evidence of defendant tended to show that the soil was firm for 3 or 4 feet and then became somewhat seamed with sand, and below this, several feet, was the sand desired and suitable for making brick. That there was no occasion for bracing if the pit was properly dug, and many excavations of like kind and of greater size and depth had been made on the premises without such bracing and without harmful incident, by simply sloping the sides of the pit. That intestate had sought employment a few days before and was told that he could dig the pit and procure the sand for the purpose indicated, and that he was instructed expressly and directed to "flam" or slope the sides. That this was done in the main and the pit properly dug, but on the day of the killing the intestate, in violation of the instructions given, had at the depth stated dug the pit straight down and even undermined the sides by digging under the same. That 10 or 15 minutes before the killing the foreman or yard boss, passing the pit, observed that the intestate was digging improperly, and told him not to dig that way, and to stop it or come out of the pit. The boss then passed to some other part of the yard and in 10 or 15 minutes the wall caved in and the intestate was killed. The ordinary issues in actions of this character were submitted, as to negligence of defendant causing intestate's death, contributory negligence on part of intestate, and damages. Among many other prayers for instructions, defendant's counsel requested the court to charge the jury that, if they believed the evidence of the defendant, the intestate was instructed to dig the sides of the pit inward, and not dig under the sides of the pit, and if the jury should find that such orders were disobeyed and such disobedience caused the injury, they should answer the first issue "No." The court gave the instructions with this modification, "That if the intestate Hawkins while in the pit could see and appreciate his surroundings, and dug under the sides of the pit in disobedience of orders and thereby caused the sides to give way, the jury should answer the first issue 'No.'"

There was verdict for plaintiff; judgment, and defendant excepted and appealed.

Simmons & Ward, D. L. Ward, T. D. Warren, Loftin, Varser & Dawson for plaintiff.

Guion & Guion and Rouse & Land for defendant.

HOKE, J., after stating the case: Where negligent default has been established against an employer by reason of some breach of an arbitrary and independent duty which he owes to his employee, as in failure to supply "machinery known and approved and in general use," a disobedience of instructions on the part of the employee and its effect are to be considered and determined, as a rule, on the issue as to contributory negligence, involving also the question of whether such disobedience is the proximate cause of a given injury. *Hicks v. Mfg. Co.,* 138 N. C., 319. But where there is no such arbitrary standard imposed or no breach of independent duty shown, and an employer having an ordinary piece of work done, gives instructions concerning it which provide and afford a simple and safe method of doing the work, he is entitled to have these instructions considered also in reference to his responsibility on the first issue; and if it is shown that conditions have been changed and work of the kind indicated rendered dangerous by reason of willful disobedience on the part of the employee and which the employer has not approved or encouraged, in such case no responsibility should attach; and this position, as a rule, is not affected by the view that the employee may take of his surroundings. On the first issue the question is, Has the employer done his duty? and under the circumstances suggested, he is entitled to have this question determined, having regard to the kind of work, the instructions given and the conditions established and the results that might be reasonably expected to follow if his instructions had been carried out.

In the present case all of the evidence tended to show that if the sides of the pit had been flammed or sloped, there was no danger attending the work, and the testimony on the part of the defendant was to the effect that the hands engaged in the work had been instructed to do it in that way. Thus the witness J. G. McDuffy, who was at that time the foreman and yard boss, speaking to the question of the employment of intestate and the instructions given, testified:

"Mr. John Barfield was running the card-room; he asked me if I could give the man some work, and I told him I did not have anything for him to do without he could go in the sand pit, and he said he would bring him out. He brought him out. I told him: 'Mr. Hawkins, I haven't anything for you to do unless you go in the sand pit.' He said: 'I will go in anywheres and work. I can ditch; I have done it, and I can dig for sand or anything else.' I said: 'If you are willing to go in, get a shovel.' He said: 'All right.' He took a shovel and went in the sand pit; that was in the morning somewhere between 6:30 and 7 o'clock; I don't remember the time—something like that."

Q.: Will you state if you gave him any instructions how the work was to be done?

A.: I did; not especially to him, but the whole crowd.

Q.: Was he present?

A.: Yes, sir. I told him to dig it with a flam—flam it down on either side; they hadn't reached the sand yet; they were about a foot and a half from the top.

This witness further stated that a short time before the occurrence, he passed the pit and, having noted that the intestate was digging under the north side of the pit, he said to the intestate: "'Mr. Hawkins, don't dig under there; if you can't get the sand without digging under there, come out of the hole.' I said: 'It will not do for you to dig under there.' He stuck his shovel down in the middle of the hole and looked up at me and said: 'When I get through with this hole there will be enough done.' I said: 'Don't dig under there any more; if you can't dig without digging under there, come out of the hole; you will make it cave in if you dig underneath.' He commenced digging right at the place where he was standing there by the box. I turned and went away."

And the witness J. R. Richards, who was working with the intestate in the pit, testified that the pit had been cut from the top in a slope—"flammed in on all sides." That Hawkins had commenced to cut under the side, and he heard the boss tell the intestate not to cut under the side in that way, and the witness himself told him to stop it.

The work was of a kind and character that any one of ordinary experience and observation would know that if the sides were undermined to any extent they were not unlikely to cave, and on the facts in evidence we are of opinion that the defendant was entitled to have the instruction given substantially as prayed for, and that the modification of the prayer made by the court constitutes reversible error.

The principle was declared and approved by this Court in *Whitson v. Wrenn,* 134 N. C., 86, and on authority of that and other cases of similar import we hold that the defendant is entitled to a new trial.

Venire de novo.

CHARLIE MERCER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 March, 1911.)

1. **Master and Servant—Duty of Master—Breach—Burden of Proof.**
   In an action to recover damages on account of negligence, the burden is upon the plaintiff to satisfy the jury that defendant owed him a duty at the time of his injury; that there was a breach of that duty, and that this breach was the cause of the injury.

2. **Master and Servant—Tools and Appliances—Duty to Inspect—Simple Tools—Equality of Knowledge—Defects.**
   With reference to simple tools, such as hammers and the like, the employer is not charged with the duty of inspection to see that they are in proper condition for the use of the employee, for ordinarily the employee is presumed to be equally conversant with the tools as the employer, and, being required to use them, is in a better situation to discover the defects; but if the employee has no power of selection or opportunity for inspection, the employer is held to the duty of furnishing a tool reasonably safe, as in such cases there is no equality of knowledge.

3. **Same—Negligence—Damages.**
   When there is no equality of knowledge between the employer and employee with respect to simple tools the former furnishes the latter with which to do his work, the employee has the right to assume that the employer has performed his duty in respect to

furnishing him the proper one; and this duty the employer may not delegate to another and escape liability for damages caused by its negligence.

4. **Same—Evidence—Questions for Jury.**

While plaintiff was striking with a sledge hammer a chisel held by defendant's boiler-maker while cutting slack rivets from a boiler, in the course of his employment, a piece of the chisel, under a blow from the hammer, flew off and injured the plaintiff's eye, causing the damage alleged in the action. There was evidence tending to show that it was the duty of the boiler-maker, whom plaintiff was employed to assist, to keep the tools in repair; that plaintiff had been working as his assistant for about a month, and that he handed a chisel to plaintiff to use, which the latter did without opportunity for inspection; that the head of the chisel was too large, and the chisel itself too thin, etc.; that plaintiff struck with the hammer when and as directed by the boiler-maker: *Held*, under the rule, viewing the evidence in its most favorable light for the plaintiff, the question as to defendant's negligence was one for the jury to determine. *Martin v. Mfg. Co.*, 128 N. C., 264, cited and distinguished.

APPEAL from *Peebles, J.*, at October Term, 1910, of EDGECOMBE.

The plaintiff, an employee of the defendant, alleges that he was injured by the negligence of the defendant in that the defendant failed to furnish him a safe tool with which to do his work. The defendant denied that it was negligent, and alleged that the plaintiff was guilty of contributory negligence.

At the conclusion of the plaintiff's evidence, his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Allen.*

G. M. T. Fountain & Son and R. T. Fountain for plaintiff.
F. S. Spruill for defendant.

ALLEN, J. A judgment of nonsuit having been entered, it is our duty to accept the evidence of the plaintiff as true, and to give to it the construction most favorable to him.

Viewed in this light, we think there was some evidence of negligence to be submitted to the jury, but we express no opinion as to its weight.

The evidence, if believed, establishes that the plaintiff had been in the employment of the defendant three or four years, but that he had been working in the boiler corner only about a month before his injury; that at the time he was injured he was employed as helper or handyman to the boiler-maker, and that it was his duty to obey the boiler-maker and to watch the tools when he was absent; that it was the duty of the boiler-maker to keep the tools in repair, and that he selected the tools with which the work was done at the time of the injury; that on 11 September, 1909, the plaintiff was required by the boiler-maker to aid him to cut slack rivets from an oil tank, and that they used a chisel and a sledge hammer weighing 10 or 12 pounds; that the boiler-maker held the chisel and the plaintiff was required to strike it with the hammer; that in doing so a piece of the iron chisel broke off and struck the plaintiff's eye; that the head of the chisel was twice as large as it ought to have been, was as thin as a knife blade, was beat out twice the size it ought to have been, and had scales all over it; that the plaintiff had only slightly looked at the chisel before his injury, and struck when the boiler-maker said do so.

When an action is instituted to recover damages on account of negligence, the law casts the burden of proof on the plaintiff to satisfy the jury that the defendant owed him a duty at the time of his injury; that there has been a breach of that duty, and that this breach was the cause of the injury. If he fails in either, he cannot recover damages.

We must, therefore, inquire into the relationship between the plaintiff and the defendant, and the duties arising from it.

As said by *Mr. Justice Brown,* in *Avery v. Lumber Co.,* 146 N. C., 595: "It has become elementary in the doctrine of negligence that the master owes a duty, which he cannot safely neglect, to furnish proper tools and appliances to his servant." "He satisfies the requirements of the law if, in the selection of his appliances, he uses that degree of care which a person of ordinary prudence would use, having regard for his own safety, if he were supplying them for his own use." *Marks v. Cotton Mills,* 135 N. C., 287; *Nail v. Brown,* 150 N. C., 535.

This duty applies alike to the simple and the complicated tools, but the authorities agree that after performing this duty, the law does not impose the same obligations with reference to the two classes of tools.

When the tools and appliances are complicated, the employer must inspect them from time to time, and must see that they are maintained in a reasonably safe condition. *Fearington v. Tobacco Co.,* 141 N. C., 83. This rule prevails because of the superior knowledge and better opportunity of the employer, as well as the increased danger to the employee.

But the rule is different in reference to tools that are simple, such as hammers, chisels, spades, axes, etc. In such cases the employer is not required to inspect, because the employee is presumed to be equally as conversant with the tool as the employer, and, being required to use it, is in better situation to discover its defects. *Dompier v. Lewis,* 131 Mich., 144; *R. R. v. Larkin,* 98 Tex., 228; *Meyer v. Ladewig,* 110 N. W. R. (Wis.), 419; *Marsh v. Chickering,* 101 N. Y., 399; *Wachsmith v. Electric Co.,* 118 Mich., 279. If the employer has provided a tool apparently safe, and there is a latent defect—one that cannot be discovered by the exercise of ordinary care—and an injury is caused thereby, there is no liability. If the tool becomes defective by use, it can be readily discovered by the employee, and it is his duty to make the defect known to the employer, that the tool may be repaired or a new one furnished. *Wachsmith v. Electric Co.,* 118 Mich., 275; *R. R. v. Larkin,* 98 Tex., 228.

This relaxation of the rule requiring the employer to inspect presupposes that the employee, by using the tool, has had the opportunity to observe defects, and that his knowledge is equal or superior to that of the employer.

If the employee has no power of selection or opportunity for inspection, the employer is held to the duty of furnishing a tool reasonably safe, as in such case there is no equality of knowledge. This doctrine was applied to the use of a monkey-wrench in *Stark v. Cooperage Co.,* 127 Wis., 322, in which the Court says: "The relaxation of the master's duty and liability rests on the assumed equality of knowledge and ability to discover the defect complained of. It can have no application to a defect of which the master is actually cognizant, and which, as a reasonable man, he should appreciate is likely to result in injury to one using the implement as it is likely to be used, and which is neither known to the employee nor of such a character as to be obvious to that observation which may be expected to accompany its use. In such case the general rule of negligence as above stated is fully effective, and the master who knowingly and negligently exposes his employee to a peril unknown to the latter must respond for the damage which results."

In *Rollings v. Levering,* 18 N. Y., 224, the tool or implement was a hook, which was furnished by a foreman, and the rule is thus stated: "The deceased, therefore, had no power of selection of hooks, but could only make use of the particular ones furnished. The hook became, therefore, an appliance used in and about the prosecution of the work, and the obligation rested upon the defendants to exercise reasonable care in furnishing a hook suitable and safe for the purpose to which it was to be applied. This duty to exercise reasonable care is absolute, and may not be delegated to another so as to relieve the master from his obligation."

In *Guthrie v. R. R.,* 11 Lea, 372, the Court approves the recital of the following charge given at the trial: "He tells them if the plaintiff was furnished this maul for work by the foreman, and that the maul was worn and defective, and the plaintiff's eye was put out by reason of this defective condition, in such employment, and the defects known by defendant or its employees, whose duty it was to look after the condition of the maul, or if said employees having such duty might have known of the defects and need of repair, by the use of such diligence and skill as a prudent and careful man would have used in attending to such a matter, the defendant would be liable." To the same effect, *Chicago v. Blivins,* 46 Kan., 370; *Newboer v. R. R.,* 60 Minn., 130; *R. R. v. Amos,* 20 Ind., 378.

The employee has the right to assume that these duties have been performed (*Jones v. Warehouse Co.,* 137 N. C., 343), and the employer has no right to delegate their performance to another. If he does so, he is "liable for negligence in respect to such acts and duties as he is required or assumed to perform, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the position of the master, and he is liable for the manner in which they are performed." *Tanner v. Lumber Co.,* 140 N. C., 479; *Bolden v. R. R.,* 123 N. C., 617.

In this case there is evidence that the chisel was defective at the time the plaintiff was injured; that it was selected by the boiler-maker, under whose directions the plaintiff was required to work; that it was the duty of the boiler-maker to keep the tools in repair; that the plaintiff was injured in the performance of his duty, and there is no evidence that the plaintiff handled the chisel or that he had ever seen it before.

The case of *Martin v. Mfg. Co.,* 128 N. C., 264, is not in conflict with the conclusion we have reached. The circumstance which distinguishes it is stated in the opinion as follows: "In the case at bar there is no evidence that any defect in the hammer was known to exist, either by the plaintiff or the defendant, nor is there any evidence to show that its condition was such as to incite an inquiry or suspicion." The decision was on the ground that the tool—a hammer—was simple in construction and, if defective, that it was a latent defect. In the discussion of the case, the Court recognizes that there may be liability if the tool, although simple, is defective, and says: "If defendant furnished its employees with tools known to it to be defective, or by ordinary care and inspection could have known of such defects, and the injury was caused by such defects, then there would have been evidence of negligence to be submitted to a jury."

This imposes upon the employer the duty of inspection, and renders him liable for injuries caused by defects which could have been discovered, which, we think, is ordinarily too exacting when applied to simple tools.

The judgment of nonsuit is set aside and a new trial ordered.

New trial.

HANSON POWERS v. ANGOLA LUMBER COMPANY.

(Filed 22 March, 1911.)

Timber Deeds—Right to Remove—Consideration—Payment—Title to Remaining Timber—Interpretation of Deeds.

A timber deed provided that all timber shall be removed by the grantee within a period of five years from the date of the last payment of the purchase money, and that an extension for that purpose would be allowed upon payment of interest on the purchase price "each year in advance": *Held*, a tender of the interest not made within the time specified in the deed is insufficient, and by his failure to make the required tender the grantee lost his right to the extension of time within which to remove the timber, and his interest in the timber remaining upon the land.

APPEAL from *Whedbee, J.*, at September Term, 1910, of PENDER.

This is an action to recover damages for cutting timber on the land of the plaintiff, and to restrain the defendant from further trespassing thereon.

On 16 June, 1900, the plaintiff, in consideration of $350 in cash and of $350 to be paid on or before 1 May, 1901, conveyed to the Angola Lumber Company, to whose rights the Carolina Timber Company succeeded, "all the pine timber, both standing and fallen, of the dimensions of 12 inches or more in diameter at a distance 12 inches from the ground, or which shall attain such size at any time within the period of five years from the date of the payment of the last installment of the purchase money above set forth."

It was further provided in the conveyance: "That all of said timber shall be removed by the said party of the second part, its successors and assigns, within a period of five years from the date of the payment of the last installment of the above-mentioned purchase money; but the said party of the second part may have such additional time as they may desire by the payment each year in advance of an amount equal to 6 per cent interest on the full amount of the purchase money hereinbefore mentioned."

The last installment of the purchase price was paid in September, 1900.

The following issues were submitted to the jury:

1. Is the plaintiff the owner of and in possession of the lands described in the complaint?

2. Did the defendants, in accordance with the timber deed introduced in evidence from Hanson Powers and wife to the Angola Lumber Company, tender to the plaintiff the sum of $42 on or before the first day of May, A. D. 1906?

3. Did defendants after the first day of May, 1906, and on or before the first day of May, 1907, tender to the plaintiff the sum of $42, in accordance with the provisions contained in deed introduced in evidence?

4. Did defendants wrongfully and unlawfully enter upon the lands described in the complaint and cut and remove the timber therefrom as alleged in the complaint?

5. What is the value of the timber cut from said lands after 1 May, 1906, to wit, in November, 1907?

The court charged the jury that if they should answer either the second or third issue "No," then they should answer the fourth issue "Yes."

The defendants excepted to this charge.

The jury answered the first issue "Yes"; the second issue "Yes"; the third issue "No"; the fourth issue "Yes"; and the fifth issue "$25."

The defendants moved for judgment on the verdict, which motion was denied, and the defendants excepted.

The defendant did not contend that the first tender was made before 28 April, 1906, or that the second tender was made before 15 May, 1907. The defendant did not enter and begin to cut until November, 1907.

There was a judgment in favor of the plaintiff, from which the defendant appealed.

E. K. Bryan and A. K. Powers for plaintiff.
J. T. Bland and A. G. Ricaud for defendant.

ALLEN, J., after stating the case: The last installment of the purchase price was paid in September, 1900, and the deed says, "All of said timber shall be removed within a period of five years from the date of the last installment of the abovementioned purchase money." It follows that the right to remove under this clause of the deed expired in September, 1905.

We have held at this term in *Hornthal v. Howcott, ante,* 228, speaking of a timber deed like this: "It is well settled, on principle and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises."

The tender was made too late to give the defendant the benefit of the extension clause.

In *Bateman v. Kramer Lumber Co., ante,* 248, a similar provision was under consideration, and it is there said: "The stipulation in this instrument, 'that the parties shall have two years in which to cut and remove the timber, and in the event they do not get it all off in that time, they shall have one year's time thereafter to remove the same, by paying to the party of the first part interest on the purchase money for said extension of time,' by correct interpretation requires that on or before the expiration of the aforesaid period of two years the grantees claiming the privilege should notify the owner of the property and tender the stipulated amount."

This case is stronger in favor of the plaintiff because it is in the deed that in order to be entitled to the extension the interest must be paid "each year in advance."

The defendants have failed to pay or tender payment within five years from the payment of the last installment of the purchase money, and have lost their rights under said deed.

No error.

JAMES EXUM, ADMINISTRATOR OF PAUL EXUM, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 29 March, 1911.)

1. **Railroads—Pedestrians on Track—Danger—"Look and Listen"—Negligence.**

   One who walks on a main-line railroad track, in full possession of his faculties, when there are quite a number of lateral tracks in constant use, with walkways between them for the safety of pedestrians, and from his previous experience as an employee of the road he should have known that, at the time, a work train carrying employees to their work customarily passed, owes a duty to keep a lookout for the dangers to himself necessarily attending his action; and when it appears from his own evidence, construed in the light most favorable to him, that the injury complained of was caused by his failure or omission to perform this duty, his negligence will bar his recovery.

2. **Railroads—Pedestrians—Licensee—Danger—"Look and Listen"—Duties.**

   Whether a trespasser or licensee, one walking on a railroad track should look, listen, and exercise the vigilance required by the surroundings, circumstances, and conditions, and the same obligation in that respect rests upon both.

3. **Railroads—Pedestrians—Danger—"Look and Listen"—Duty of Engineer—Duty of Pedestrian—Avoidance of Injury—Nonsuit.**

   The plaintiff's intestate, a sound man, with no apparent infirmity, and an employee of defendant railroad company, was walking along the main-line track going to his work, at the time a train provided for the purpose of taking him and other employees to their work customarily passed. At this place there were many lateral tracks, having walkways between them for pedestrians, upon which trains were constantly passing. The employees' train, going in the same direction as plaintiff's intestate, overtook and killed him as he was walking briskly along on the track. A witness testified that he saw intestate's danger, and in view of the plaintiff and defendant's engineer ran from 20 to 30 feet in direction of intestate, waving his hands and shouting to warn the intestate of his danger, but did not attract the attention of any one: *Held*, (1) it was equally incumbent upon the intestate as well as the engineer to keep a sharp lookout, and the latter had the right to assume, had he seen the signals, that the intestate would see and hear the warnings of the witness, and would step off the track at the last moment and avoid the injury; (2) judgment of nonsuit upon the evidence was properly sustained.

4. **Railroads—Pedestrians—Danger—"Look and Listen"—Negligence, Concurrent.**

Where a pedestrian and an engineer of a railroad company are both negligent in failing to keep a proper lookout for danger, and in consequence the pedestrian is run over and killed or injured, the negligence of both is concurrent, and no recovery may be had in an action for damages against the company.

HOKE, J., concurring; CLARK, C. J., dissenting.

APPEAL from *Guion, J.*, at April Term, 1910, of EDGECOMBE.

This action is brought to recover damages for the alleged negligent killing of plaintiff's intestate, Paul Exum. At the conclusion of the evidence a motion to nonsuit was allowed, and plaintiff appealed.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

Gilliam & Bassett for plaintiff.
F. S. Spruill and J. L. Bridgers for defendant.

BROWN, J. The evidence in this case was all introduced by the plaintiff and in its most favorable aspect for him tends to prove these facts:

The intestate, Paul Exum, was an employee of defendant in its shops at South Rocky Mount, a man of sound mind, about 34 years old and with no bodily infirmity. On the morning of 1 February, 1907, the intestate was walking south on the main-line track of defendant, going from North Rocky Mount, about a mile, to South Rocky Mount to his work. The regular "shop train" of defendant, used to carry employees at the same hour every morning, had left North Rocky Mount on its regular run for South Rocky Mount and was using the main-line track, going in same direction at from 12 to 15 miles per hour. It ran over the intestate and killed him. At the time of the casualty the intestate was in the full possession of his faculties, walking briskly on the main-line track. There was nothing unusual about his appearance, except that he appeared to plaintiff's witness, Thorp, to be looking down on the track.

There are half-dozen tracks between North and South Rocky

Mount with spaces of 6 feet between them, which spaces are used by pedestrians and bicyclists. The tracks are in constant use by all kinds of trains and engines.

The evidence discloses nothing about the intestate to indicate to the engineer of the shop train other than that he would step off the track at any moment and let him pass.

The intestate was an employee of defendant at its South Rocky Mount shops, and must have been familiar with the constant passage of trains over these tracks, and especially with the schedule of the shop train.

It must be admitted that the intestate was entirely out of his place walking on a main-line track under the circumstances and conditions disclosed by the evidence. He should have used the established walkways between the tracks, as witness Thorp was doing, or else he should have taken the shop train provided by defendant for its employees who resided in North Rocky Mount.

That the intestate was guilty of great carelessness and negligence in failing to use his faculties and keep a vigilant lookout for engines while on the railroad track is established by a multitude of decisions of this Court, over thirty-five in number. *Coleman v. R. R.*, 153 N. C., 325.

In referring to this rule of law in the case of *Cooper v. R. R.*, 140 N. C., 212, *Mr. Justice Hoke* well says: "This rule is so just in itself and so generally enforced as controlling that citation of authority is hardly required."

The rule applies to those who cross the railroad tracks and with equal if not greater force to those who walk up and down them.

It is immaterial whether we consider the intestate in the light of a trespasser or licensee, the same obligation to look, listen, and to exercise vigilance rested upon him.

This Court has held uniformly that "even where it is conceded that one is not a trespasser in using the track as a footway from a foundry to his house, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of its trains.

A railroad company has the right to the use of its track, and its servants are justified in assuming that a human being who has the use of all his senses will step off the track before a train reaches him." *McAdoo v. R. R.*, 105 N. C., 153; *Parker v. R. R.*, 86 N. C., 221; *Meredith v. R. R.*, 108 N. C., 616; *Norwood v. R. R.*, 111 N. C., 236; *High v. R. R.*, 112 N. C., 385.

In *Neal v. R. R.*, 126 N. C., 638, this Court said: "If plaintiff's intestate was walking up defendant's road, in open daylight, on a straight piece of road, where he could have seen defendant's train 150 yards, and was run over and injured, he was guilty of negligence; and although the defendant may have been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer, as it ought to have done, yet the injury would have been attributed to the negligence of plaintiff's intestate."

Speaking of the principle involved in the cases determining the injured party's negligence, the Court says: "According to the principle declared in all of them, the question of liability is not to be solved by any reference to what the defendant may have done or omitted to do, but by the conduct of the plaintiff; and if the latter would not see when he could see, or would not hear when he could hear, and remained on the track in reckless disregard of his own safety, the law adjudges any injuries he may have received to be the result of his own carelessness." *Bessent v. R. R.*, 132 N. C., 940; *Pharr v. R. R.*, 133 N. C., 615, approving *Neal's case* and *Bessent's; Allen v. R. R.*, 141 N. C., 340; *Crenshaw v. R. R.*, 144 N. C., 325; *Royster v. R. R.*, 147 N. C., 347.

In *Syme v. R. R.*, 113 N. C., 558, it is held that "When a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law imputes the injury to his own negligence," and "that the engineer was justified in assuming that the intestate *had looked* and had notice of his approach and would clear the track in ample time to save himself from harm."

In the recent case of *Beach v. R. R.,* 148 N. C., 153, this subject is discussed elaborately by *Mr. Justice Walker* and all the cases cited and reviewed.

The plaintiff seeks to take this case out of the established rule by attempting to prove that the engineer of the shop train could have avoided killing the intestate by exercising reasonable care, and failed to do so. This condition is based upon the testimony of Thorp, who says: "I was between the last western track and the eastern track when I saw Exum, and he was walking along with his head down, walking very brisk, with a tin bucket on his arm." Thorp says he saw the shop train approaching the intestate, and when it was 150 feet from Exum, "I commenced to wave at him and shout. Ran 20 or 25 feet towards him, waving my hat at him and halloaing to him. He seemed to be walking right along and did not notice me. Then I commenced waving train down and pointing at the track. I did not succeed in attracting anybody's attention." Thorp further states that there was nothing between him and Exum, or between him and the train, to obstruct the view.

We fail to see anything in this evidence to take this case out of the rule laid down in the cases cited. It is not even suggested, much less contended, that the engineer purposely and willfully ran down and killed his coemployee. There is no evidence whatever that the engineer actually saw Thorp's signals in time to stop, or that he saw them at all.

But plaintiff contends that it was the engineer's duty to see them. The engineer's duty was to keep a vigilant lookout in front of him, and especially along the track over which he was running. It was no more the duty of the engineer to see Thorp's signals than it was the duty of the intestate. It was as much incumbent upon him to keep a sharp lookout as upon the engineer. In fact, had the engineer seen Thorp's signals, he had a right to assume up to the last moment that the intestate also saw them and that he would step off the track out of harm's way.

The intestate was a sound man, with no apparent infirmity, walking briskly along ahead of a train with the uses and schedule of which he was necessarily familiar. The engineer had every reason to believe that such a man was exercising vigilance and would get out of the way and let him pass.

In this class of cases it will be found generally that where the company has been held liable it is in cases where the party injured was not upon equal chances with the engineer to avoid the injury—where there was something suggesting the injured party's disadvantage or disability, as where the party injured is lying on a railroad track, apparently drunk or asleep, or is on a bridge or trestle, where he cannot escape, or cannot do so without great danger. In such cases, if the engineer saw the party injured, or by proper diligence could have seen him, the company is held liable for the engineer's negligence. *Neal v. R. R.,* 126 N. C., at p. 639. See, also, *Norwood v. R. R.,* 111 N. C., 236; *High v. R. R.,* 112 N. C., 385; *McAdoo v. R. R., supra.*

Assuming, however, that the engineer was negligent as well as the intestate, the negligence of both is concurrent, and, as said *Mr. Justice Allen* in *Harvell v. Lumber Co., ante,* 254: "It is well settled that, when the plaintiff and the defendant are both negligent and the negligence of both concur and continues to the time of the injury, the negligence of the defendant is not in the legal sense proximate."

As lately held by a unanimous Court in *Beach's case, supra,* when a person is injured upon a railroad track, which injury could have been avoided by him by looking and exercising proper vigilance, the negligence of such person in this respect is concurrent, and damages are not by him recoverable on that account.

Upon an unbroken line of authorities we are of opinion his Honor properly sustained the motion to nonsuit.

Affirmed.

HOKE, J., concurring: If it be conceded that the defendant in this case was negligent, I concur in the decision, for the reason that, accepting all of plaintiff's evidence as true, and taking every permissible inference arising on the entire testimony and which makes for his claim, as established, it appears that when he was killed the intestate was voluntarily walking along the main line of defendant's track, at a time and place where a train might be expected any moment, in broad daylight, in the full possession of his faculties, and with nothing to restrain or hinder his movements, without paying the slightest attention either to his placing or surroundings. There is nothing, therefore, to qualify the obligation that was upon him to be careful of his own safety, and, to my mind, it presents a typical case of contributory negligence, negligence concurring at the very time of the impact, and recovery by plaintiff is therefore properly denied.

CLARK, C. J., dissenting: The plaintiff's intestate was killed by the defendant's engine. The bare fact that the intestate was walking on the track did not, as a matter of law, give the defendant the right to kill him. The Court ought not to hold as a matter of law that killing under such circumstances is necessarily rightful. Whether it is excusable or not is a matter which depends upon the circumstances of the case and is an inference to be drawn by the jury, for, notwithstanding the intestate's negligence (if he was negligent under the circumstances of this case in walking upon the track), if the defendant's engineer with a due regard to human life and by keeping a proper lookout could have avoided killing the deceased, it was incumbent upon the defendant to have done so, and its failure to do so was the proximate cause of the death of plaintiff's intestate.

There are many circumstances in this case which require that the question of proximate cause should have been left to the jury, and that the judge should not by a nonsuit have adjudged that the defendant had a right as a matter of law to kill the deceased. The deceased, an employee of the defendant, on his way from his work, was walking, according to the custom of employees at that place, along the track on his way home. He was walking along with his head down, his back to the engine, and evidently oblivious to its approach. The track was straight and where the deceased was walking was within the town limits of Rocky Mount. The evidence is that the track was "customarily" used by the employees of the defendant corporation and by the general public as well, without objection, as a walkway between Rocky Mount and South Rocky Mount to the same extent as if it were a public street. The defendant's engine was running at from 12 to 15 miles per hour, an excessive speed within town limits, and though it had passed over many crossing places where street after street crossed the track, it blew no signal at any of them. The train was a shop train and was not running on its regular track. The deceased was walking on the main track on which no train was scheduled to pass at that hour. There was evidence tending to show that a passing freight train on another track prevented the intestate from hearing the approaching train behind him. It was the duty of the engineer to have kept an efficient lookout in front of him, and with proper care he could have seen that the deceased was preoccupied, with his back turned to the approaching engine, and looking down on the track. The engineer knew that this track was customarily used by the public, that the deceased was walking on a track on which no engine was scheduled to pass at that hour, that he himself was running on an unusual track for his engine, and, more than this, his attention was specially called to the fact that the deceased was inadvertent to the approach of his train by the gestures and signal of the witness Thorp, who was walking by the side of that track some 200 feet in front of the engine and facing it, who saw the danger the deceased was in, and who ran forward waving his arms and making signals to the engineer. The engineer should have seen the oblivious condition of the deceased as quickly as Thorp, even if the latter had made no signals. While, ordinarily, an engineer seeing a man walking on the track may expect him to get off when he blows his whistle, here the engineer neither blew the whistle nor rang his bell.

All the above facts combined, together with the excessive speed of the engine, certainly required some action on the part of the engineer. It was not necessary for him to stop his engine, but he should at least have blown his whistle or rung his bell. *Stanley v. R. R.*, 120 N. C., 514, in which it was held that "a person walking on a railroad track has a right to suppose that the railroad company would take care to provide against injuring pedestrians by the use of proper signals and to feel secure in acting upon that supposition." Had the engineer blown his whistle after he saw Thorp's signals—and he should have seen them, with a proper lookout, when 150 feet from the deceased—the deceased would have been awakened from his reverie and been given notice to step off the track. A human life should be at least worth the trouble of the engineer raising his hand to pull the cord that sounds the whistle. It ought not to be held as a matter of law that in all cases whatever a man forfeits his life by the mere fact that he walks on a railroad track, and that in such cases the railroad company may rightfully kill him, like a rat caught in a box.

It is not contended by the plaintiff that his intestate was entirely without negligence in walking on the track, though to do so at that point was permissive and customary. But, notwithstanding that negligence, if the engineer could have prevented killing the deceased by the exercise of proper care on his part, then the proximate cause was the negligence of the defendant, and the killing of the deceased was not rightful as a matter of law, but was wrongful as a matter both of fact and of law. If the engine had not been running at an excessive speed, if the whistle had been blown at each crossing, if the train had been running on its rightful track, and if the engineer had kept a proper lookout so that he would have seen that the deceased was oblivious to the approach of the engine from the rear, which he could not hear on account of the noise made by the freight train passing on another track, and if he had taken notice of the frantic gestures of the witness Thorp immediately in his front, calling attention to the jeopardy of the deceased, and if under these circumstances a blast of the whistle would have given the deceased notice in time of the approach of the fatal train, then the proximate cause of the death on the actual facts was the negligence of the defendant's engineer. At least, these facts should have been submitted to the jury.

In *Arrowood v. R. R.,* 126 N. C., 630, the Court held that where the public are in the habit of using the railroad track as a passway, then the defendant should exercise greater care, move its trains at a lower speed and keep a keener lookout in front than in going along a straight track in an open country, and that "the amount of care depends upon the circumstances in each case," and sustained the finding that "notwithstanding the negligence of the plaintiff's intestate, the defendant by the exercise of ordinary care should have avoided the killing of the intestate."

In *Edwards v. R. R.,* 129 N. C., 81, it was held that where the train was passing, as here, through a town at an excessive speed, this was evidence of negligence on the part of the defendant and should be submitted to the jury on the issue of proximate cause. In *Fulp v. R. R.,* 120 N. C., 525, the Court held that the failure to sound a whistle at a crossing was evidence of proximate cause where the deceased was killed along the track beyond the crossing. In that case *Furches, J.,* said: "Though the intestate may have been guilty of negligence by going on the defendant's road, whether drunk or sober, it was still the duty of the defendant's engineer to be in his place, on the lookout, and if he saw the intestate or could by due diligence have seen him in time to stop the train and save the life of the intestate, it was his duty to do so, and if he did not, he was guilty of negligence, and the defendant would be liable." He further said that it was error for the judge to charge, "If the intestate's failure to note approaching trains was in whole or in part because he was drunk, and was run over and killed in consequence, this would be contributory negligence, and the jury should answer the second issue Yes." "This puts the whole case upon the intestate's being drunk, and if this charge was sustained, it would be a free license to every railroad company in the State to run over and kill every drunken man that got on its road, whether the conductor saw him or not—a doctrine, it seems to us, too shocking to be insisted upon."

In *Powell v. R. R.,* 125 N. C., 374, it was held, citing *Fulp v. R. R., supra,* and many other cases, that it was negligence not to sound the whistle at a public crossing when the person killed was on the track and the whistle might have given him notice to get off. That case has been cited by many others since (see Annotated Ed.). In *Morrow v. R. R.*, 147 N. C., 623, *Mr. Justice Walker* held: "The failure of the employees of a railroad company to give crossing signals at a public crossing does not constitute negligence *per se*, when the injury complained of occurred to a pedestrian by using the track at a different place, but it is only evidence of negligence under certain conditions." If evidence of negligence, it should have been submitted to the jury to say whether it was sufficient under the conditions of this case. This last quotation was cited by *Mr. Justice Hoke,* in *Norris v. R. R.*, 152 N. C., 510, who said: "Where a person is on the track, at a place where people are habitually accustomed to use the same for a walkway, they have a right to rely to some extent and under some conditions upon the signals and warnings to be given by trains at public crossings and other points where such signals are usually and ordinarily required, and failure on the part of the company's agents and employees operating its train to give proper signals at such points is ordinarily evidence of negligence, and where such failure is a proximate cause of an injury it is, under some circumstances, evidence from which actionable negligence may be inferred," citing *Randall v. R. R.*, 104 N. C., 410, where the plaintiff was driving his oxen along the road near the track, and by reason of the whistle not being sounded at the crossing he did not turn out, and the train so frightened his oxen that they got upon the track and were killed.

Upon the authorities, it is clear beyond controversy that the intestate was a licensee and not a trespasser, and though he was guilty of negligence, if those in charge of the train could with proper care have prevented the injury by blowing the signals or by running the train at a moderate speed, the defendant is liable. The matter is fully discussed in *Teakle v. R. R.*, 10 L. R. A. (N. S.), 486, at p. 491, with full citation of authorities, which are thus summed up: "While trainmen are not usually bound to foresee or watch for the wrongful presence of any person upon the track, even where it is open to the adjoining highway, yet, as experience has shown that at certain points persons are thus constantly entering upon the track, such persons, if injured as a proximate result of the trainmen's failure to use ordinary care to keep watch for them, may recover damages if the trainmen could have seen them without difficulty, by keeping a reasonable watch, even though in fact they did not see them. Especially should this rule be applied where the railroad company has acquiesced in the use thus made of its property." It is further said that in such cases the duty is "imposed upon the train operatives with respect to observing a reasonable lookout in the direction of the moving train, the extent of which it is not for the court to say, but it is to be determined by the triers of fact under all the circumstances of the case." The citations of authority in this case are very full and the reasoning is convincing and just.

In *Williamson v. R. R.* (Va.), 113 Am. St., 1032, it is held: "If the right of way of a railroad corporation at a particular point has long been in use as a walkway, and this is well known to the company, it is under the duty of using reasonable care to discover, and not to injure, persons whom it might expect to be on its tracks at that point," citing *Blankenship v. R. R.*, 94 Va., 499; *R. R. v. Rogers*, 100 Va., 234.

In *Troy v. R. R.*, 99 N. C., 298, *s. c.*, 6 Am. St., 521, it is held that walking on the track is not in itself such contributory negligence as will bar a recovery of damages for injuries sustained, if the company by reasonable care could have prevented them. To same effect, *Guilford v. R. R., post; R. R. v. Phillips*, 2 Am. St., 155, and note; *R. R. v. Walker*, 3 Am. St., 638; *Hurt v. R. R.*, 4 Am. St., 374; *R. R. v. Watson*, 5 Am. St., 578, and note.

In *Schmidt v. R. R.*, 3 L. R. A. (N. S.), it is said, citing *Harland v. R. R.*, 65 Mo., 22, that notwithstanding the contributory negligence of the intestate, "The company is liable if by the exercise of ordinary care it could have prevented the accident after discovery by defendant of the danger in which the injured party stood, or if the company failed to discover the danger through the recklessness or carelessness of its employees when in the exercise of proper care they could have discovered the danger of the intestate and have averted the calamity."

In *R. R. v. White* (Va.), 10 Am. St., 874, it is held that the railroad company owes to a licensee on its track ordinary care and prudence, and that the intestate who was killed while walking on the track is not barred of recovery if the engineer might by the exercise of care on his part have avoided the consequences of the negligence and carelessness on the part of the intestate. To same effect, *Haggerty v. Wagner* (Ia.), 39 L. R. A., 399; *Bogan v. R. R.,* 129 N. C., 154; *s. c.,* 55 L. R. A., 418, and notes. In *Raines v. R. R.* (W. Va.), 24 L. R. A., 226, it is held that if one is walking along the track apparently in possession of his faculties the engineer may presume that he will get off the track, provided due signals are given. To same effect, *R. R. v. Baker* (Kan.), 21 L. R. A. (N. S.), 427, and notes.

In 2 Thomp. Neg., sec. 1596, it is said that the rule which requires the railroad to keep a lookout ahead of its trains at crossings and at places where the track is much used by the public "is reduced to meaningless verbiage, unless it is followed up by the corresponding rule that where a person negligently exposes himself to injuries upon the crossing, the railroad company will be liable if by the maintenance of a lookout it *might have discovered the traveler* in his exposed situation in time by the exercise of reasonable care to have avoided killing or injuring him." For this proposition numerous cases are cited, and the author adds: "The cases which hold the contrary seem to have no counterpart in the jurisprudence of any other English-speaking country, and form a disgraceful chapter in American jurisprudence." The same point is elaborated in the same volume, secs. 1724, 1725, 1726, 1836, 1837.

There were numerous street crossings of this track and the track itself was, with the permission of the defendant, customarily used by its employees and the public as a street, according to the evidence. Yet the evidence of Thorp is that no whistle was blown or bell was rung that he heard, and this is evidence, under our authorities, to go to the jury that there was none, in the absence of evidence to the contrary. Authorities might be multiplied, but it has never yet been held law, in this State or elsewhere, and cannot now be held with my assent, that the mere fact that one walks upon the railroad track is conclusive evidence that his negligence is the cause of his death, regardless of the surrounding circumstances; and yet such is practically the rule if, under all the circumstances in this case, it is held that the defendant, as a matter of law, had a right to kill the deceased and that by a nonsuit a jury can be deprived of any right to determine whose negligence was the proximate cause of the death.

SUMMIT SILK COMPANY v. KINSTON SPINNING COMPANY.

(Filed 29 March, 1911.)

1. **Equity—Remedy at Law—Code Practice.**

   Under our Code system of practice, pleadings, and procedure, it is unnecessary for a party seeking equitable relief to first reduce his demand to judgment, or exhaust his legal remedy by execution or other appropriate process.

2. **Corporations—Insolvency—Application—Creditors.**

   When a corporation is insolvent or in imminent danger of insolvency, and especially when its business operations have practically been suspended owing to its financial condition, the court may, upon proper application of a creditor or stockholder, appoint a receiver of its assets to be administered for the benefit of all of its creditors. Revisal, secs. 847, 1219, 1203.

3. **Same—Trust Fund.**

   In its action for the recovery of a certain plant or machine, damages for its detention and for a receiver of the defendant company, the plaintiff alleged that the defendant falsely represented its capital stock to be $50,000 and had failed in the performance of its contract of purchase of the machinery to increase its capital stock, as agreed upon, by the issuance of common and preferred stock, of which the plaintiff was to receive a certain part as payment, the title to the machinery to remain in the plaintiff vendor until the agreement was performed. Upon the pleadings and proof his Honor found as a fact that the plaintiff had shown an apparent right to the machinery in question and that it was or should be in defendant's possession, and that the machinery had a specified value, and the rents and profits thereof were in danger of being lost; that the defendant was insolvent and indebted to the plaintiff and others: *Held*, the creditors were entitled to have the defendant corporation's assets preserved and administered for their benefit, and that a receiver for that purpose was proper.

4. **Corporations—Insolvency—Receivers—Application—Creditors—Definition.**

Any one who has a debt or demand against an insolvent corporation upon contract, express or implied, comes within the meaning of the word "creditor," used in the statute, and may apply to the courts and obtain, in proper instances, the appointment of a receiver for the corporation.

5. **Foreign Corporations—Insolvency—Receivers—Property Here—Procedure.**

An insolvent corporation, with its property or plant located in this State, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another State, approving *Holshouser v. Copper Co.*, 138 N. C., 248.

6. **Corporations—Insolvency—Receivers—Pleadings—Relief Granted.**

It appears in this case from the facts alleged in, and the general scope of, the complaint, that the relief should not be restricted to the exact prayer of the complaint, but should be extended so as to afford relief which is commensurate with the averments, under the familiar rule that it is not the language of the prayer, but the allegations of the pleading that determine the extent of the relief to be granted.

APPEAL from order appointing a receiver in an action from LENOIR, made by *O. H. Allen, J.,* at chambers, in Kinston, 15 February, 1911.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Loftin, Varser & Dawson for plaintiff.
G. V. Cowper and H. E. Shaw for defendant.

WALKER, J. Plaintiffs allege that they contracted to sell to the defendant, Kinston Spinning Company, what is known as a "Throwing Machinery Plant," which is used in the manufacture of certain kinds of silk products, upon the understanding and agreement that the Spinning Company should increase its capital stock from the amount ($50,000) it was then represented to be, to $80,000, and that said capital stock, when so increased, should be divided into preferred stock to the amount of $30,000 and common stock to the amount of $50,000, the plaintiff, G. W. Graham Company, to receive, as its part of said stock, preferred shares of the par value of $12,000, and shares of common stock of the par value of $25,000, the balance of the preferred and common stock to be issued to William H. Ashley, and that when this arrangement was perfected and the stock issued in accordance with the said agreement, the "Throwing Machinery Plant" should become the property of the Kinston Spinning Company, and in the meantime the title to remain in the plaintiffs or the G. W. Graham Company. That the machinery plant was delivered under this agreement to the Spinning Company, who receipted for it as the property of the G. W. Graham Company. It is further alleged that the Spinning Company, by its officers or agents, who acted for it in the transaction, falsely represented their capital stock to be $50,000, whereas it was much less than that amount, and also falsely represented the amount and condition of its assets, and instead of being a solvent and going concern, as the plaintiffs were led to believe, it is an insolvent and crippled institution, badly managed and with no funds to conduct its business; and further, that it has repeatedly refused, upon demand, to comply with its part of the contract of sale and is really unable to do so, and that plaintiff's "machinery plant" has, by hard usage, become greatly deteriorated and diminished in value, and that plaintiffs are in imminent danger of losing the said property. That the Spinning Company has used the plant and received and enjoyed the benefits thereof for a long time, which use is reasonably worth the sum of $6,000, and that the Spinning Company is indebted to the plaintiff in that amount, and also is liable for the injury to the plant, other than ordinary wear and tear, and for its value, if delivery of the plant to the plaintiff cannot be secured. The plaintiff demands judgment for the sum of $6,000 for the detention and use of the plant, for the recovery of the plant itself, for the appointment of a receiver to take charge of the said plant and the estate and effects of the Spinning Company, and for general relief.

The defendant denied the material allegations of the complaint, and affidavits and exhibits were filed by the respective parties, for the consideration of the judge, upon the application for the appointment of a receiver.

At a hearing before *Hon. O. H. Guion*, a temporary receiver was appointed, and the cause afterwards came before *Hon. O. H. Allen*, who upon the pleadings and proof found as a fact that plaintiff had shown an apparent right to the property, the subject of the action, which is or should be in the possession of the defendant, and that the property and the "rents and profits" thereof are in danger of being lost, the value of the Throwing Machinery Plant being $15,056. He also found as a fact that the Kinston Spinning Company is insolvent and is indebted to the plaintiff, its creditors, as above set forth, and that the Summit Silk Company, the G. W. Graham Company, plaintiffs in this action; the Kinston Spinning Company and Kinston Real Estate Company are all corporations created and existing under the laws of the State of New Jersey, the two last-named companies having real and personal property in this State. The Kinston Real Estate Company was, on motion of the plaintiffs, made a defendant, because, as the judge found, it has or claims an interest in the subject of the controversy. Upon these and other findings not material to be stated, his Honor, *Judge O. H. Allen*, made the receivership permanent, and invested the receiver, E. M. Land, with all the powers conferred by the statute (Revisal, ch. 41, sec. 846 *et seq.*), and especially with those conferred by chapter 21, entitled "Corporations," and subchapter 13 (sec. 1219 *et seq.*), with special directions to advertise for creditors to come in and prove their claims, and for all parties, including stockholders, interested in the assets of the defendant, to come in and make themselves parties to the action and protect their rights. It was provided in the order of the court that no finding of fact made for the purpose of passing upon the motion for the appointment of a receiver should prejudice either party in the further progress and trial of the case, and that the parties should have the right of amending their pleadings. The order appointing the receiver having been duly entered and the cause retained for further orders and directions, the defendant Kinston Spinning Company excepted and appealed.

The judge, at the request of the Spinning Company, reconsidered his findings of fact, but declined to change the same, and we will not do so, there being ample evidence to support them. The objections urged by the appellant to the judge's order are:

1. That the plaintiffs had a complete and adequate remedy at law by an action for the recovery of the specific property, and damages, with the ancillary remedy of claim and delivery.

2. That a general receiver should not have been appointed, but only a special receiver to hold and preserve the property pending the litigation.

We do not understand it to be necessary, since the change in the constitution of our courts, the blending of the two systems of law and equity and the radical, though useful and practical innovations in pleading and in the practice and procedure of our courts, that a plaintiff who resorts to an equitable remedy for the protection of a right or the redress of a grievance should first reduce his claim to judgment and exhaust his legal remedy by execution or other appropriate process, as under the old system. We have held that this is not required to be done, but that the right will be administered and full relief given in one action. *Bank v. Harris,* 84 N. C., 206; *Mebane v. Layton,* 86 N. C., 574; *McLendon v. Comrs.,* 71 N. C., 38. The subject is so fully discussed in *Bank v. Harris* that we need not longer dwell upon it.

Our statute is so broad and comprehensive in its provisions regarding the appointment of receivers that it is not necessary to refer to the general power of a court of equity in such cases. Revisal, sec. 847, provides that "A receiver may be appointed before judgment on the application of either party when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court"; and by section 1219 it is provided that, "Whenever any corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, or be in imminent danger of insolvency, or has forfeited its corporate right, or its corporate existence shall have expired by limitation, a receiver may be appointed by the court under the same regulations as are provided by law for the appointment of receivers in other cases." One of the regulations for the appointment of a receiver may be found in Revisal, sec. 1203, which is in the same chapter with section 1219. That section provides that a receiver of the property and effects of a corporation may be appointed upon application of a creditor or stockholder. Who should apply for the appointment, if not some person who is interested in the proper conduct of the corporation's affairs and the application of its assets to the payment of its debts? This remedy is provided by the statute, not merely for a creditor who has exhausted his remedy at law, but for all creditors, and any one of them is entitled to proceed against the corporation to have its assets administered by a receiver when it is insolvent or is in imminent danger of insolvency, and especially when its financial condition is such as to practically cause a suspension of its business. We deem the principle settled by our decisions. In *Holshouser v. Copper Co.*, 138 N. C., at p. 251, in a discussion of the very question now presented, we said: "The cause of action in this proceeding is that of the creditors of the Copper Company, and consists not only in the failure of the company to meet its obligations, but in the suspension of its ordinary business, which entitled the creditors to have its assets placed in the hands of the receiver for the purpose of being applied to the payment of its debts. This proceeding is equitable in its nature, and the jurisdiction of the court in respect to the claims of the creditors of the corporation must be determined, not by regarding it as a suit by each one of them for the purpose of recovering his debt, as if he had brought an ordinary civil action wherein the liability would be fixed by judgment and enforced by execution, but the cause of action must be considered as one belonging to the creditors, who have the right under the statute, if not on general principles of equity, to have all the assets of the concern placed in the possession of the court, through its duly appointed officer, to the end that the rights of all parties therein may be ascertained and distribution made accordingly. It has become the settled rule in this country that the assets of an insolvent corporation constitute a trust fund for the payment of its debts, and the remedy of its creditors by action in the nature of a suit in equity, or by what is called a creditor's bill, to have the assets administered for their benefit, is firmly established." *Hill v. Lumber Co.,* 113 N. C., 173; *Bank v. Cotton Mills,* 115 N. C., 507; *Ellett v. Newman,* 92 N. C., 519. But authority or express decision is not required to show that the power to appoint a receiver in a case like the one at the bar resides in the court, when the statute plainly and explicitly so provides. The creditors are clearly entitled to have the assets of a defendant, if an insolvent corporation, applied as a trust fund for their benefit, and it is necessary to appoint a receiver in order to preserve and administer them for this purpose. The defendant cannot object that the "Throwing Machinery Plant" was placed in the custody of the receiver. If it is the plaintiffs' property, no prejudice can come to the defendant if, with their consent, it is held by the receiver until the defendant's claim to it is passed upon; and if the defendant's property, it is a part of its assets and its custody properly belongs to the receiver. There is a controversy as to the title of the machinery plant, and the interest of both parties will be protected if it is held and preserved until that dispute is determined.

The only remaining question to be decided in this branch of the case is whether the plaintiff is a creditor within the meaning of the statute. Any one who has a right to require the fulfillment of an obligation or contract for the payment of money is a creditor in the strict technical sense of the term—any one, in other words, who has a debt or demand against another upon contract, express or implied, for the payment of money. *Atwater v. Bank,* 45 Minn., 341 (12 L. R. A., 741). It will be found that the word "creditor" has received a broad and liberal interpretation by the courts when construing legislation in regard to the rights of claimants to satisfaction of their demands out of the assets of an insolvent corporation, or even any insolvent individual. Natural justice, it is said, demands that those who suffer from breaches of contract should be included in the distribution of the assets of the insolvent, even though the breaches and consequent damages follow the insolvency, and it is in perfect consonance with the scope and design of the legislation considered, to give its provisions a comprehensive meaning which will admit of that justice being done. *Spader v. Mfg. Co.,* 47 N. J. Eq., 18; *Anderson v. Anderson,* 64 Ala., 403; *Marstaller v. Mills,* 143 N. Y., 398; *Coal Co. v. Stevens,* 63 N. J. Eq., 107.

The last two cases just cited go beyond what is necessary for us to decide in this case, and hold that the term creditor includes not only a person who has an enforcible demand arising out of contract, but also one who has such a claim sounding in tort. In *Rosenbaum v. Credit System Co.,* 61 N. J. Eq., 543, it was held that the term "creditor" found in the legislation relating to insolvent corporations and the administration of their assets by receivers is not used in a narrow, restricted or technical sense, but embraces within its proper and natural meaning any one who is entitled to recover an amount liquidated or unliquidated, of the insolvent, as damages, for the breach of an express or implied contract. *Anderson v. Anderson, supra.* Black's Dict., p. 299. A debt is something due from one person, the debtor, to another called the creditor, and may be created by simple contract or evidenced by specialty or judgment according to the nature of the obligation giving rise to it. Within any definition of the word, the plaintiff was entitled, as a creditor of the Spinning Company, to institute this action.

The defendant objects that the court had no jurisdiction to proceed in this suit against the defendants because they are foreign corporations, creatures of the laws of New Jersey. The precise question was considered in *Holshouser v. Copper Co.,* 138 N. C., at p. 254, in the appeal of the State of New Jersey, and we decided contrary to the present contention in this case. We there said: "'If each Government in cases of insolvency should sequester and distribute the funds within its own jurisdiction, the general result would be favorable to the interest of creditors and to the harmony of nations. This is the rule adopted in all cases of administration of the property of deceased persons; and there is no real difference between the principle of those cases and of cases of bankruptcy.' . . . 'The municipal laws of a country have no force beyond its territorial limits, and when another Government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted on her own citizens; otherwise, justice would be sacrificed to courtesy; nor can the foreigner or stranger complain of this. If he sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate.' So it is in this case. When the Copper Company was chartered and permitted to migrate from its domicile and conduct its business in this State, where it has acquired property under the protection and operation of the local laws, its assets should in all fairness be held subject to the provisions of those laws in favor of persons who have dealt with it here as a domestic corporation, which is virtually its true character, though in law it is considered as a corporation of New Jersey. *Goodwin v. Claytor,* 137 N. C., 224." The property of the Spinning Company is in this State and the laws of New Jersey should not be permitted to affect its status or prejudice the rights of creditors of the corporation in respect of it. They must all come into this jurisdiction in order to have its assets administered for their benefit, and cannot get relief in the courts of New Jersey, because the property is situated here. If we should deny the remedies of our law to them, for the reason assigned by the defendant, the assets in this State would be practically exempt from the claims of creditors.

We do not think the plaintiffs should be restricted to the appointment of a special receiver, as their relief, having reference to the facts alleged in, and the general frame of, the complaint, should be of much broader scope, and must be measured, not according to the exact prayer of the complaint, if it stops short of that to which the plaintiffs are entitled upon the averments of the complaint, but should extend to all relief commensurate with such averments. *Knight v. Houghtalling*, 85 N. C., 17; *Voorhees v. Porter,* 134 N. C., 591.

A careful examination of the case in all its aspects leads us to conclude that there was no error in the judgment below.

No error.

W. P. HARDY v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 29 March, 1911.)

1. **Insurance—Policies—Assignment—Insurable Interest—Good Faith—Affection—Knowledge—Evidence.**

When in an action to recover upon a life insurance policy by an assignee thereof there are appropriate issues as to the good faith of the assignee or beneficiary in paying the premiums, and whether the interest of the assignee was an insurable one, evidence is competent, upon the question of good faith in the assignments, which tends to show the affectionate relationship between him and the insured, that the insured regarded him as a son, and that he knew nothing of the transaction before the policy and its assignment to him were brought to him by the agent of the company.

2. **Insurance—Policies—Interpretation—Assignment—"First Payment"—Waiver.**

A provision in a life insurance policy payable to the estate of the insured, that it shall not be in force until the first premium is paid by the insured, is waived when the agent of the company is aware of all the facts, and upon information given by him to the State agent and the company itself, the latter sent the policies and forms for an assignment to the local agent for the purpose of having the contract completed, and received from the assignee, the beneficiary, the premiums for four years; and it thus appearing that the beneficiary paid the first premium without previous knowledge of the transaction, the first payment made by him was a valid one.

3. **Same—Valid Inception.**

When a life insurance policy is delivered to the insured, but was assigned to the beneficiary, and the first payment of premiums was made by the beneficiary under circumstances rendering the payment a valid one, though against a stipulation in the policy that it must be paid by the insured to be binding on the company, it renders the policy valid in its inception.

4. **Insurance—Policies—Insurable Interest—Assignment—Validity—Wagering Policies.**

A policy of life insurance valid in its inception may be assigned to one not having an insurable interest in the life of the insured, when done in good faith, and not as a mere cloak or cover for a wagering transaction. *Hardy v. Ins. Co.*, 152 N. C., 286, cited and approved.

5. **Insurance—Policies—Delivery—Intent.**

A delivery of a policy of life insurance may be shown by the intent of the parties, and its physical delivery is not necessary.

6. **Insurance—Policies—Assignment—Waiver—Payment of Premiums—Wagering Policy—Knowledge—Evidence—Valid Contract.**

The agent of the defendant insurance company solicited and procured from insured applications for several policies of insurance, with the agreement that his children should pay the premiums thereon. When the policies were delivered to insured it was found that one of the children would not pay the premiums on one of them, and the insured told the agent he wished plaintiff to have the policy. The agent said that the plaintiff did not have an insurable interest, but for insured to take the policy, have it payable to his estate, and assign it to plaintiff, which was done accordingly, with knowledge thereof given to the defendant company, which sent the policies and assignment blanks to the agent, who had them executed and delivered them to the plaintiff, theretofore unaware of the transactions, and he continued to pay the premiums to the company for four years: *Held,* it was too late for the company to object to the validity of the assignment and the payment of the premiums by the plaintiff, after the maturity of the policy.

APPEAL from *Whedbee, J.,* at November Term, 1910, of LENOIR.

The plaintiff, W. P. Hardy, sues on three policies of insurance, which he alleges were issued by the defendant on 19 October, 1904, on the life of Parrott M. Hardy. He claims that he had an insurable interest in the life of the insured, and also as assignee of the policies.

The defendant resisted recovery upon the grounds:

1. That the plaintiff had no insurable interest in the life of the insured, and therefore could not apply for a policy of insurance on his life.

2. That he could not take as assignee, because the policy was not delivered to the insured, insisting that in the absence of stipulations in the policy, there was no evidence of delivery, and further, that the plaintiff admitted that he paid the first premium and that the policies were then delivered to him, and that the policy provided that it should not be in force until the first premium was paid.

3. That the whole evidence proved a wagering contract of insurance forbidden by law.

On 24 September, 1904, Parrott M. Hardy made application for the three policies sued on, payable to his estate. The policies are dated 19 October, and are payable to the estate of said Hardy in accordance with the application.

On 31 October, 1904, two of said policies were assigned to the plaintiff, W. P. Hardy, and on 31 December, 1904, the third policy was assigned to him, the form of assignment in each case being as follows:

For value received, I hereby transfer, assign, and turn over unto William P. Hardy all my right, title, and interest in policy No. ......, issued by the Ætna Life Insurance Company of Hartford, Conn., on the life of Parrott M. Hardy, and all benefit and advantage to be derived therefrom.

Witness my hand and seal at Institute, State of North Carolina, this ...., 1904.

PARROTT M. HARDY. [L. S.]

Witness: THOMAS MCGEE.

The agent of the defendant testified in regard to the applications and policies: "I solicited the application for life insurance and he agreed to the insurance for the benefit of his children, and each child was to pay his part. The policies were procured as applied for. When they were to be delivered, Mr. Parrott M. Hardy told me that one or more of the children was unable to take the insurance, and suggested that his nephew, W. P. Hardy, take the insurance that his son was unable to take; and I told him that it would be all right, but that he did not have an insurable interest, but that I could have the policy assigned to him. I filled a blank requesting the company to assign the policy to W. P. Hardy. . . . He told me that W. P. Hardy was as near to him as his own child; that he often did him great favors. He expressed the desire that the insurance be for the benefit of W. P. Hardy, and I suggested that it be assigned to him. I then produced the blank for assigning the policies to W. P. Hardy, which he, Parrott M. Hardy, signed, requesting that the company make the policy or policies payable to W. P. Hardy. . . . I do not remember whether Mr. W. P. Hardy knew about the assignment of policy to his benefit until I took the policy to him. My mind is not clear on that. My recollection is that he knew nothing about the transaction until I went to deliver him the policy after the assignment. My recollection is that I had no talk with Mr. W. P. Hardy until after policy had been assigned. These transactions were with Mr. Parrott M. Hardy."

It was provided in each policy that: "This policy shall not take effect until the first premium hereon shall have been actually paid during the lifetime and good health of the insured and within sixty days from the date hereof, a receipt for which payment shall be the delivery of this policy."

All the premiums were paid by the plaintiff, and the first was not actually paid before the assignments to the plaintiff. There was evidence tending to prove that the local agent of the defendant knew that the plaintiff did not have an insurable interest in the life of the insured, and that it was the purpose of the insured to have the policies assigned to the plaintiff, and for the plaintiff to pay the premiums, and that the local agent informed the State agent of the defendant of these facts, who, in turn, gave the home office the same information.

It was also in evidence that after obtaining this information, the defendant forwarded the policies and the forms for the assignments to its local agent, in order that the policies might be delivered, and that prior to the receipt of the policies and assignment by the said agent, the plaintiff knew nothing of the transaction. The plaintiff was a nephew of the insured, and evidence was introduced tending to show that the relationship between them was affectionate and that the insured regarded the plaintiff as he did his own children.

The issues submitted to the jury and the answers thereto are as follows:

1. Were the alleged assignments of the three policies of insurance sued on executed by Parrott M. Hardy before the delivery of the said policies to W. P. Hardy, the plaintiff? Answer: "Yes."

2. Was the first premium on Policy No. 63215 paid by the plaintiff before or at the time of delivery of said policy to W. P. Hardy, the plaintiff? Answer: "Before."

3. Was the premium on Policy No. 62846 paid by the plaintiff before or at the time of the delivery of said policy to W. P. Hardy, the plaintiff? Answer: "At the time."

4. Was the premium on Policy No. 62845 paid by the plaintiff before or at the time of the delivery of said policy to W. P. Hardy, the plaintiff? Answer: "At the time."

5. Did the plaintiff pay all the premiums, including the first premium on said policy? Answer: "Yes."

6. Did the plaintiff pay the first premiums on said policy in pursuance of an agreement that the said policies should be assigned and transferred to him? Answer: "Yes, as testified to by plaintiff and witness McGee."

7. Were the policies of insurance sued on in this action delivered to Parrott M. Hardy, deceased? Answer: "Yes."

8. Did the plaintiff participate in the issuance of the policies of insurance sued on in this action? Answer: "No."

9. Were the assignments of said policies made in good faith and not as a cover for any fraudulent speculations in the life of Parrott M. Hardy, deceased? Answer: "Yes."

10. Did the plaintiff at the time of the assignment of said policies have an insurable interest in the life of Parrott M. Hardy? Answer: "Yes."

11. In what sum, if any, is plaintiff entitled to recover of defendant? Answer: "$3,000, with interest from the ...... day of 19.."

G. V. Cowper and J. Paul Frizzelle for plaintiff.
Rouse & Land for defendant.

ALLEN, J., after stating the case: There are forty-five exceptions in the record, of which twenty-eight bear upon evidence introduced to prove that the plaintiff had an insurable interest in the life of the insured, or upon instructions in regard thereto.

In the view we take of this case, these exceptions are immaterial, but if material, it was competent to show that an affectionate relationship existed between them, as tending to establish good faith on the part of the plaintiff and to rebut the idea that he had entered into a wagering contract, and was merely speculating in the life of his uncle.

It was also competent to show by the agent of the defendant the circumstances attending the signing of the applications for insurance, and the delivery of the policies to the plaintiff, and for the plaintiff to testify that he knew nothing of the transaction before the policies and the assignment of them were brought to him by the agent. This evidence related to the question of good faith, and as to whether there had been a delivery of the policy to the insured.

The other exceptions are directed principally to the effect of the evidence, the defendant contending that on the whole evidence the policies were not delivered to the insured, and, if delivered, that they were not valid, because it was a wagering contract.

The verdict in this case, rendered on competent evidence and under correct instructions, establishes the fact that the plaintiff did not participate in the issuance of the policies, and that the assignments to him were made in good faith and not as a cover for any fraudulent speculation in the life of the insured, and it is not denied that the defendant, with a knowledge of the facts, received the premiums from the plaintiff for four years.

Under these circumstances, the defendant ought to be required to pay, unless the contract is one condemned by law.

In *Crosswell v. Assn.*, 51 S. C., 116, the Court, while discussing wagering contracts of insurance, says: "A sound public policy requires the enforcement of contracts deliberately made, which do not clearly contravene some positive law or rule of public morals. It is surely not a sound policy to permit insurers to contract to insure the lives of persons, receive premiums therefor as long as the insured, the beneficiary, or the assignee will continue to pay, and then, when the time comes for the insurers to pay what they agreed to pay, allow them to escape their contract on the ground of want of insurable interest in the life of the insured, unless it clearly appears that such contracts are pernicious and dangerous to society. Courts should not annul contracts on doubtful grounds of public policy. In such matters it is better that the Legislature should speak first"; and in *Grabbs v. Ins. Co.*, 125 N. C., 396, *Justice Douglas* announces the same principle. He says: "We think the rule is well settled that where an insurance company, life or fire, issues a policy with full knowledge of existing facts which by its terms would work a forfeiture of the policy, the insurer must be held to have waived all such conditions, at least to the extent of its knowledge, actual or constructive. It cannot be permitted to knowingly issue a worthless policy upon a valuable consideration."

We come then to the consideration of the question whether the facts of this case, which are practically uncontroverted, require us to declare the policies void. They do not impose this duty on us, if the policies were delivered to the insured and were valid in their inception.

Justice Hoke, speaking for the Court, so declared the law on the former appeal in this case, reported in 152 N. C., 288, as follows: "We consider it, however, as established by the great weight of authority, that where an insurant makes a contract with a company, taking out a policy on his own life for the benefit of himself or his estate generally, or for the benefit of another, the policy being in good faith and valid at its inception, the same may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured: provided this assignment is in good faith, and not a mere cloak or cover for a wagering transaction."

The question we have to determine is not, Was there a delivery to the insured, but, Was there evidence of the delivery, fit to be submitted to the jury? If there was evidence, it was for the jury to find the fact.

The failure of the insured to pay the first premium was evidence upon the question, but not conclusive. The local agent of the defendant knew all the facts, and the information he had was given to the State agent of the defendant and to the defendant itself. With this information, the defendant sent the policies and the form for the assignments to the local agents for the purpose of having the contract completed, and received the premiums for four years. We think this is beyond question a waiver of the provision in the policy that it shall not be in force until the first premium is paid.

In *Kendrick v. Ins. Co.,* 124 N. C., 317, the Court says: "The authorities are numerous and quite uniform that the acknowledgment in the policy of the receipt of the premium estops the company to test the validity of the policy on the ground of nonpayment of the premium. In so far as it is a mere receipt for money, it is only *prima facie,* like other receipts, and will not prevent an action to recover the money if not in truth paid; but in so far as it is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy. The rule is thus stated in Biddell on Insurance, sec. 1128: 'As a general rule, it has been held in the United States that while such a receipt will prevent the insurer from proving the premium was unpaid in order to show the policy was void from its inception, it may be contradicted in order to show, on a suit for premium, that no payment had been made.' "

In *Gwaltney v. Assur. Co.,* 132 N. C., 928, *Chief Justice Clark,* speaking for the Court, thus states the rule: "The authorities are numerous that a general agent can waive any stipulation in the policy, notwithstanding a clause in the policy forbidding it, for he can waive that clause as well as the other."

Justice Brown states the same principle in another way in *Rayburn v. Casualty Co.,* 138 N. C., 381: "Where the policy is delivered, there being no allegation or proof of fraud, the delivery is conclusive proof that the contract is completed and is an acknowledgment that the premium was properly paid during good health." Also, *Justice Connor* in *Rayburn v. Casualty Co.,* 141 N. C., 431.

It is also clear, we think, that the payment of the first premium by the plaintiff does not invalidate the policies, as it appears that he did not procure the issuance of the policies, and knew nothing of the transaction before the policies and assignments were brought to him.

In *Shea v. Mass. Ben. Assn.,* 160 Mass., 291, speaking of a policy to one not having an insurable interest, the Court says: "The relationship in which Margaret stood to John, and the matters disclosed in her testimony, tended strongly to show that the policy or certificate of membership was obtained in good faith, and not for the mere purpose of speculating on the hazard of a life in which she had no interest; and if so, the contract was valid if made with him, though made for her benefit, and though the premiums were paid by her"; and in *Mutual Life v. Blodgett,* 8 Tex. Civ. App., 48, it is said: "It is urged by appellant that the policy is void for the reason that the beneficiary named in the policy had no insurable interest in the life of the insured, and the policy was speculative and wagering on the part of the plaintiff. The policy recited that it was issued upon the application of Mrs. Lucinda J. Downey; J. A. Blodgett was named as the beneficiary, and his relation as grandson was therein disclosed. It is not shown that any fraud or deception was practiced upon the insurance company by which it was deceived as to the real party to the contract of insurance. It was proven that the beneficiary was to pay the premiums; this was known to the company; indeed, his note was taken for the first premium, and the policy was issued by the company with full knowledge of the facts as to the relation of the parties, and of their respective interests and undertakings under the contract. Under this state of facts, the company should not be permitted to deny that the policy speaks the truth as to the party who made the application, and with whom the contract of insurance was made."

"The mere payment of the premiums by the plaintiff is not conclusive that the policy was taken out by him." *Langdon v. Mut. Life,* 14 Fed., 275; *Valton v. Nat. Life,* 22 Barb., 35; *Ætna Life Ins. Co. v. France,* 94 U. S., 565.

If, therefore, the failure of the insured to pay the first premium and the payment thereof by the plaintiff do not render the policies void, it seems to follow that they were valid at their inception if they were delivered to the insured. The jury has found that they were so delivered.

Was there sufficient evidence to be submitted to them? To constitute a good delivery, it is not necessary that the policies should have been in the actual possession of the insured.

"Delivery is largely a question of intention, as evidenced by words or acts. The requisites of a valid delivery may be said to be three: (1) There must be an intention on the part of the person executing the policy to give it legal effect as a completed instrument; (2) this intention must be evidenced by some word or act indicating that the insurer has put the instrument beyond his legal control, though not necessarily beyond his physical control; and (3) the insured must acquiesce in this intention." Vance on Insurance, p. 169.

"It was not necessary to the completion of the contract that the policy should be actually delivered to the insured. The issuance of a policy in accordance with the terms agreed on, and its transmission to the agent for unconditional delivery to the insured, is tantamount to a delivery." *Porter v. Ins. Co.,* 70 Vt., 508.

The doctrine that it is the intention of the parties that controls, and not the transfer of possession, has been applied in numerous cases to deeds and insurance policies. *Mass. Life v. Sibley,* 158 Ill., 414; *Black v. Sharkey,* 104 Col., 280; *Martin v. Bates,* 50 S. W. R., 39 (Ky.); *Kelsa v. Graves,* 64 Kan., 777; *Arrington v. Arrington,* 122 Ala., 514; *N. Y. Life v. Babcock,* 104 Ga., 72.

In *Waters v. Annuity Co.,* 144 N. C., 669, the same principle is declared as follows: "It is not required at all that the acceptance of the company should be indicated by a manual delivery of the policy to the insured."

If we apply the tests laid down, we think the evidence of delivery is plenary.

There was evidence practically uncontroverted, that the agent of the defendant solicited the insurance; that the insured told him he would take the policies and his children would pay the premiums; that he afterwards told the agent his children could not pay the premiums and that he wished the plaintiff to have the policies; that the agent told him the plaintiff did not have an insurable interest, but that he could take the policies, payable to his estate, and assign them to the plaintiff; that the insured applied for the policies payable to his estate, and they were so issued by the defendant; that the agent informed the defendant of these facts, and with this knowledge the defendant sent the policies and blank assignments to its agent;

that the assignments were witnessed by the agent; that the policies and assignments were delivered to the plaintiff, who was ignorant of the matter and acted in good faith, and that for four years the defendant continued to receive the premiums with full knowledge, and was silent as to the objection it now raises.

Under these circumstances, it would be unjust to the plaintiff and the defendant alike to say that it was not the intention of the parties for the policies to be delivered to the insured, and that they should be completed binding contracts. We deem it not improper to say that the evidence shows that the local agent and the State agent acted in good faith throughout the transaction.

We find no error, and the judgment is affirmed.

No error.

JOHN H. MILLER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 29 March, 1911.)

1. **Pleadings—Demurrer—Common Law—Presumptions—Burden of Proof.**
   When a cause of action, sued on and recognized here, arose in another State, a demurrer to the complaint is bad which is based on the defense that, according to the laws of such other State, no cause of action is alleged. Such defense must be set up in the answer, with burden of proof on defendant.

2. **Evidence—Common Law—Sister States—Presumptions.**
   In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister State, except in those States whose jurisprudence is not founded on the common law.

3. **Evidence—Sister States—Laws—Judicial Notice.**
   The courts will not take judicial notice of the statutes and laws in the different States which may have changed the common law.

4. **Evidence—Sister States—Laws—Burden of Proof—Procedure.** The proof of the laws of another State must be shown in evidence by the party relying upon them, and the methods of proof and the competency of evidence is regulated by statute. Revisal, sec. 1594.

APPEAL by defendant from *Cook, J.,* at October Term, 1910, of WAYNE.

Civil action heard upon demurrer to the complaint.

The court overruled the demurrer. Defendant appealed.

The facts are sufficiently stated in the opinion of *Mr. Justice Brown.*

No counsel for plaintiff.

W. C. Munroe and W. A. Townes for defendant.

BROWN, J. Taking the allegations of the complaint to be true, as we must upon demurrer, we are of opinion that the demurrer was properly overruled. There is only one ground of demurrer that we deem it necessary to consider.

It is alleged in the complaint that the injury was received at Pinner's Point, Virginia, on 21 April, 1907, and that under the laws then and now in force in said State the plaintiff has a good cause of action against the defendant.

The issue attempted to be raised by the demurrer, that under the laws of Virginia the plaintiff is not entitled to recover, cannot be raised in that way. Such defense must be set up in answer, and the burden of proof would be on the defendant to establish it.

According to the principles of the common law, the facts alleged, if established by proof, make out a good cause of action, and it is very generally held that in the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister State, except in those States whose jurisprudence is not founded on the common law. 13 A. and E. Enc., 1062. The general principle, that a condition of things once established is presumed to continue until the contrary is shown, has been applied to the proof of foreign laws.

The courts will not take judicial notice of the statutes and laws of the different States which may have changed the common law. 13 A. and E., 1063, and cases cited. The proof of them must be put in evidence by the party relying on them, and the methods of proof and the competency of evidence is regulated by statute. Revisal, sec. 1594. *Hancock v. Tel. Co.*, 142 N. C., 164.

Affirmed.

W. H. HUGGINS v. T. N. WATERS, F. K. BORDEN, ET AL.

(Filed 29 March, 1911.)

1. **Lands—Lessor and Lessee—Hotel—Sewerage—Quiet Enjoyment—Implied Covenant.**
   A lease of a hotel equipped with bath tubs, closets, etc., in a city with a sewerage system, etc., carries with it an implied covenant of quiet enjoyment extending to a proper sewerage connection during the term of the lease, unless the lessee has taken the property with notice or knowledge that it was otherwise.

2. **Lands—Leases—Quiet Enjoyment—Covenant—Trespasser.**
   A covenant of quiet enjoyment implied from a lease of lands, etc., does not extend to acts of trespassers or wrongdoers, but only to those whose rights are superior to the lessor.

3. **Same—Pleadings—Inconsistent Pleas—Election—Procedure.**
   The plaintiff leased a hotel equipped with baths, closets, etc., working with sewerage connections in a city having a sewerage system, and, having entered into possession, found that the sewer connected with the hotel was a private one traversing the lands of an adjoining owner. In an action against his lessor and the adjoining owner he alleged, as to the former, a breach of an implied covenant of quiet enjoyment, and that the latter maliciously, wantonly, and wrongfully stopped up the sewer pipe, to his damage, etc. The cause of action as to both defendants being damages arising from stopping the sewer: *Held*, (1) the wrongful acts alleged as against the adjoining owner were those of trespass or wrongdoing, and inconsistent with the allegations of breach of covenant on the part of the lessor; (2) the action was remanded to the Superior Court so that the plaintiff may elect the cause of action he will prosecute, and amend his complaint accordingly.

APPEAL from *Cook, J.,* at September Term, 1910, of WAYNE.

Civil action for damages. At the conclusion of the evidence the court sustained a motion to nonsuit, and plaintiff appealed.

In this Court plaintiff's counsel entered a *nolle prosequi* as to defendant, the city of Goldsboro.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

George E. Hood, H. L. Stevens, W. S. O'B. Robinson, and J. M. Robinson for plaintiff.

W. W. Pierce and W. T. Dortch for defendant Waters.

D. C. Humphrey for City of Goldsboro.

F. B. Daniels and Aycock & Winston for Borden.

BROWN, J. The facts as stated in the plaintiff's brief and upon which he relies are as follows: The plaintiff leased from the defendant Waters a certain hotel building in the city of Goldsboro for a period of five years. At the time of the lease, said building was equipped with bath tubs, sinks, and water-closets, and was apparently connected with the sewerage system of the city of Goldsboro. The plaintiff entered and took possession under his lease, furnished the hotel and opened it to the public, who patronized it generously. Subsequently, it was discovered that the sewerage system of the hotel was not connected with the city sewerage, but with a private drain pipe.

The defendant Borden cut the drain pipe and cemented it up, thus making it necessary to discontinue the use of the sewerage system of the hotel, and thereby rendering the building itself useless for the purpose of a hotel.

The plaintiff seeks to recover of the defendant Waters, upon the theory:

1. That there was an implied covenant upon the part of the lessor Waters that the building leased was suitable for the purposes of a hotel, and that the sewerage, being a necessary adjunct of the hotel, was the property of the lessor, and that the lessee had the right to continue its use.

2. That there was a breach of the implied covenant of quiet enjoyment.

3. That the lessor wrongfully failed to apprise the plaintiff of any defect in the right to use the sewerage connection.

It is alleged, and evidence offered by plaintiff tending to prove, that at the time Waters leased the hotel building to the plaintiff Huggins it was fitted up with bath tubs, sinks, and closets, and the sewerage thereof was connected with a private drain pipe running through the lands of F. K. Borden, and that plaintiff had a right to believe that the lessor had good right and title to drain the sewage from the hotel through said private drain.

Upon this theory it would seem to be settled that plaintiff has made out a cause of action against Waters, unless the latter can establish the allegation of his answer, that he apprised plaintiff at the time of the lease that he had no legal right to sewerage through this private drain, or establishes some other valid defense.

The implied covenant of quiet enjoyment extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the demised premises. It has been extended to the case of light and air. *Case v. Minot,* 158 Mass., 677; *Darnell v. Columbus Showcase Co.,* 13 L. R. A. (N. S.), 333; *Jackson v. Paterno,* 108 N. Y. Sup., 1073; 24 Cyc., 1046.

But the plaintiff has embodied in his complaint an allegation that is destructive of the above cause of action, to wit, that the defendant Borden maliciously, wrongfully, wantonly, and unlawfully severed and stopped up effectually the drainage aforesaid "so that the sewage from the hotel sinks, bath tubs, closets, etc., could not pass through said drain pipe and out into the basin."

Plaintiff offers evidence which, it is claimed, tends to prove this allegation. Dismissing the theory of a conspiracy between these several defendants, to support which there is not a shred of proof, it is manifest that the alleged cause of action against Borden is destructive of the alleged cause of action against Waters.

If Borden acted wrongfully and illegally, he was a trespasser, and the implied covenant of quiet enjoyment of a lessor does not extend to the acts of trespassers and wrongdoers, but only to those whose rights are superior to the lessor. *Sloan v. Hart,* 150 N. C., 274; *King v. Reynolds,* 67 Ala., 233.

It necessarily follows that if Borden's acts were wrongful, there has been no breach of the implied covenant upon the part of Waters. If Borden's acts were rightful, then there has been a breach of such covenant, unless the lessor Waters can make out a valid defense to that cause of action.

These two causes of action are inconsistent, and, as said by *Mr. Justice Walker* in *Parker v. Ins. Co.,* "The one necessarily excludes the other, and in the sense that an election must be made between them." 143 N. C., 343.

In this condition of the pleadings and proofs, in the exercise of our discretion, we will remand the cause, to the end that the plaintiff may elect as to which cause of action he will prosecute and may reform his complaint accordingly.

Let one-half of all the costs of this appeal be taxed against plaintiff and one-half against the defendants Waters and Borden.

Remanded.

S. B. LEE AND R. L. GODWIN v. NEW HAMPSHIRE INSURANCE COMPANY.

(Filed 29 March, 1911.)

Insurance, Fire—Cancellation—Substitution—Mortgagor and Mortgagee—"Loss Payable" Clause—Estoppel—Equity.

The defendants, three fire insurance companies, issued several policies on a mortgaged premises with the usual loss clause, payable to the mortgagee. One of them solicited, through its agent, a policy in substitution of the three policies, and issued a policy accordingly, claiming through its general agent the premiums therefor. In this policy there was no clause with loss payable to the mortgagee, and it appears that he was not aware of the change of policies until after the property was destroyed by fire and the insurance due. The other companies were notified, and canceled their policies, sending them to the mortgagor, requesting a return of the canceled policies, which were not returned because of their being in possession of mortgagee. In an action by the mortgagor and mortgagee against the three companies to recover the insurance due by the loss by fire of the premises: *Held,* (1) the insurance company issuing the substituted policy and the mortgagor are estopped by their conduct to deny the cancellation of the three original policies and the substitution of the later one in lieu thereof; (2) the release of the three original policies was only binding between the parties to the agreement, and not upon the mortgagee; (3) the mortgagee is entitled to judgment for one-third part of his debt against each of the three original policies, to be canceled upon payment of his loss out of the substituted policy.

APPEAL by defendants from *Cook, J.,* at November Term, 1910, of HARNETT.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

Godwin & Townsend, E. F. Young, and J. C. Clifford for plaintiff.

Aycock & Winston for defendants.

CLARK, C. J. Plaintiff Lee owned a hotel at Dunn which was under mortgage to his coplaintiff, Godwin. Best was agent for each of the three defendant insurance companies. He insured the hotel, in August, 1909, in the Shawnee Insurance Company, for $1,000; in the Royal Insurance Company, for $1,000; and in the New Hampshire Insurance Company, for $1,000. The premiums on these policies were paid by Lee and the policies were delivered to Godwin, mortgagee. They contained a provision: "Any loss that may be ascertained and proven to be due the assured under his policy shall be held payable to R. L. Godwin, trustee, as interest may appear."

On 14 October, 1909, at the instance of Strudwick, the special agent of the Shawnee Insurance Company, who came to Dunn and offered that his company would carry the entire $3,000, a policy for that amount was issued by the Shawnee Insurance Company, and Best notified the Royal Insurance Company and the New Hampshire Insurance Company that they had been relieved of all liability upon their respective policies, which had been canceled, and that the entire $3,000 insurance had been taken over by the Shawnee Insurance Company. Best also wrote to Lee, who was in Georgia, inclosing him this new policy in the Shawnee Insurance Company for $3,000, stating that the change would save Lee $5 and requesting him to return the three policies of $1,000 each. Lee admits receiving the new policy and the letter and made no objection, though he did not return the three policies as requested. On the same day that Best wrote Lee he also notified the general agents of the Shawnee Insurance Company that he had canceled the three $1,000 policies mentioned above and had issued in lieu thereof a new policy in the Shawnee Insurance Company for $3,000. They received this letter and reinsured the entire risk of $3,000 in four other companies, retaining a profit for the Shawnee Insurance Company on the transaction. On 27 November, 1909, the hotel was burned. On 6 January, 1910, the general agents of the Shawnee Insurance Company wrote to Best claiming the premium on the $3,000 policy. At the time of the fire Lee had retained possession of the $3,000 policy for a month and 13 days without having made any objection. The $3,000 policy contained no clause making the loss payable to Godwin, as his loss might appear, and Godwin had no notice of the substitution of the $3,000 policy for the three $1,000 policies which had remained in his possession, a fact which doubtless accounts for their not being returned to Best by Lee on receipt of the new policy for $3,000.

There is neither allegation nor proof that calls in question the entire good faith of all the parties to this transaction. Upon the above facts it is clear, without requiring the citation of authorities, that both the Shawnee Insurance Company and the plaintiff Lee are estopped and concluded by their conduct and acts to deny the cancellation of the three original policies of $1,000 each issued in August, 1909, and the validity of the substitution of the $3,000 Shawnee policy in lieu thereof. The plaintiff Lee is therefore entitled to judgment against the Shawnee Insurance Company alone, which is liable to said

Lee in the sum of $3,000 according to the terms of the last policy issued by it. The Shawnee Insurance Company wanted all the business, and it has got it.

As to the plaintiff Godwin, it is admitted that the realty after the destruction of the hotel is sufficient to pay off his mortgage, so in no event does he run the risk of any loss. But we are of opinion that, if he so desires, he is entitled to have judgment entered up for one-third part of his debt against each of the three original policies, to be canceled, however, by payment to him of the amount of his loss, which Lee is adjudged to make to him out of the recovery on the $3,000 policy held by Lee against the Shawnee Insurance Company. Godwin is entitled to this because the release of the Royal Insurance Company and the New Hampshire Insurance Company was made without his knowledge and assent, and is only binding between the parties thereto, to wit, the plaintiff Lee and the Shawnee Insurance Company.

As thus modified, the judgment of the court below will be Affirmed.

ALBERT BOWEN v. JOHN PERKINS.

(Filed 29 March, 1911.)

1. **Deeds and Conveyances—Title—Common Source—Rule of Convenience.**

   As a rule of convenience and not as a matter of estoppel, parties to an action involving title to land claiming it from the same person are not allowed to deny the title in the common source.

2. **Same—Superior Title—Evidence.**

   When the title to the land in controversy is claimed by both parties from a common source, the older title will prevail unless there is shown a better title from the one under whom both claim, or from some other person.

3. **Deeds and Conveyances—Common Source—Inconsistent Title—Evidence.**

   One who enters into possession of lands under a contract to purchase creates a relationship with the owner analogous to that of tenant and landlord; and until ousted or disturbed in his possession by one having a paramount title, he will not be permitted in an action for possession by the party under whom he entered to set up a title inconsistent with his.

4. **Deeds and Conveyances—Title—Common Source—Contract of Purchase—Rule of Convenience.**

When the plaintiff and defendant in an action to recover lands deduce their title from a common origin, the one by deed and mesne conveyances and the other under an executory contract of purchase, neither is allowed to deny the title in the common source, for between them the elder is the better title and must prevail unless the adverse party can show a better outstanding title which he has acquired.

5. **Same—Parol Agreement—Statute of Frauds.**

The plaintiff claimed title to the lands in controversy by deed and mesne conveyances, and defendant claimed under an alleged parol contract of purchase made by his lessor with one under whom plaintiff claimed in his chain of title: *Held*, the statute of frauds was not involved, and evidence of the parol contract was admissible to show that defendant claimed title from the same source as plaintiff.

APPEAL from *O. H. Allen, J.*, at November Term, 1910, of COLUMBUS.

This action was brought to recover the possession of land, and damages for withholding it. Plaintiff introduced in evidence deeds from Caleb Allen and wife, Susan Allen, to John Bright, dated 21 February, 1901, and from John Bright and wife, C. E. Bright, to A. E. Powell, dated 22 December, 1905, and from A. E. Powell to the plaintiff, Albert Bowen, dated 8 June, 1907. All these deeds conveyed the land in dispute and were registered. The plaintiff proposed to prove by John Rogers, one of his witnesses, that the witness bought the land from Caleb Allen and his wife, but had not paid the price, nor had the vendors made him a deed under his contract of purchase; and further, that after he had thus bargained for the land he leased it to the defendant John Perkins, put him in possession and agreed to sell it to him. This evidence was excluded, and the plaintiff excepted. There was a verdict for the defendant and judgment thereon, from which the plaintiff appealed.

J. B. Schulken and E. M. Toon for plaintiff.
No counsel for defendant.

WALKER, J., after stating the case: The plaintiff offered the evidence which was rejected, for the purpose of showing that he and defendant derived their title from the same source, Caleb Allen, and that the plaintiff was not required, if that be true, to prove a good and perfect title in Caleb Allen, from whom both titles were traced, upon the familiar rule that where the title of both parties is disclosed and found to have a common origin, the plaintiff, having the older of the two, is entitled to recover, unless the defendant shows that he has a better title than the plaintiff, which was derived either from the person under whom they both claim or from some other person who had such better title. It is not a case strictly of estoppel, but a well-settled rule of evidence, founded in justice and convenience. *Johnson v. Watts,* 46 N. C., 228; *Ives v. Sawyer,* 20 N. C. (Anno.), 179. It is generally expressed in this way, that where both parties claim title under the same person, neither is allowed to deny that such person had title; but the rule is subject to the qualification just stated, and does not mean that the defendant is estopped to connect himself by proof with the true owner. *Caldwell v. Neely,* 81 N. C., 114; *Spivey v. Jones,* 82 N. C., 179; *Collins v. Swanson,* 121 N. C., 67. In this case it appears that John Rogers contracted to buy the land from Caleb Allen and took possession of it by his tenant, the defendant, under his purchase. In *Dowd v. Gilchrist,* 46 N. C., 353, the defendant bought the land from Major Dowd and "took his word for a title." The Court held that "when the defendant entered under his contract of purchase from Major Dowd, he became his tenant at will, and as such could not dispute his title." *Love v. Edmonston,* 23 N. C., 152.

In Bigelow on Estoppel (5 Ed.), p. 547, we find it laid down that the relation of landlord and tenant is virtually created, so far as the question of estoppel is concerned, where a party enters into possession of land under a contract to purchase it; and such a person, until ousted or disturbed in his possession by one having a paramount title, will not be permitted in an action for possession by the party under whom he entered to set up a title inconsistent with his. The doctrine of estoppel, with reference both to the grantee in a deed and the purchaser under a contract of sale, as stated in Bigelow on Estoppel at pages 546-547, has received the approval of this Court, though the text-book was not cited. *Drake v. Howell,* 133 N. C., 163. See *Farmer v. Pickens,* 83 N. C., 550; *Rountree v. Blount,* 129 N. C., 25. As the plaintiff and defendant deduce their title from a common origin, the plaintiff from Caleb Allen by deed to the first grantee and mesne conveyances, and the defendant's lessor as the vendee under an executory contract of sale, this case is brought within "the inflexible rule of evidence," as *Judge Ashe* states it in *Christenbury v. King,* 85 N. C., 230, that where both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail, unless (if the plaintiff has the senior of the two titles) the defendant can show a better title outstanding and that he has acquired it. *McCoy v. Lumber Co.,* 149 N. C., 1; *Sample v. Lumber Co.,* 150 N. C., 161; *Foy v. Lumber Co.,* 152 N. C., 595. It is the possession of the defendant, under his claim of right or title from the common source, whether by deed or lease, or what is the legal equivalent of a lease, a contract of purchase, that determines the application of the rule as is shown by the cases last cited. This does not deprive the defendant of the right to show that he has the better title, even as between the parties claiming only from a common source, or that he has, in some other way, acquired the superior title. The authorities merely declare that a plaintiff's case is made out when all that appears is that he and the defendant claim under the same common grantor, and the question is one of the state of proof only. They distinctly show that the defendant may overturn the plaintiff's case by showing a paramount title, under which he (the defendant) claims against that of the common grantor. Bigelow (5 Ed.), p. 346, and note 6. This case is governed by the ordinary rule, as the parties claim from a common source, and not otherwise.

That the contract between Caleb Allen and John Rogers, defendant's lessor, was not in writing, if that be the fact, can make no difference. This is not an action by the vendor to enforce the performance of the contract by the vendee, and the statute of frauds is not involved. *Cowell v. Ins. Co.*, 126 N. C., 684. The evidence is competent to show that defendant claims title from the same source as the plaintiff, and thereby, nothing else appearing, recognized the validity of the title thus asserted. *Sample v. Lumber Co., supra; Bryan v. Hodges*, 151 N. C., 413.

In this view of the case, the testimony offered by the plaintiff should have been admitted, and there was error in excluding it.

New trial.

M. M. PERSON v. W. M. PERSON AND WIFE.

(Filed 29 March, 1911.)

Waste—Injunction—Principal Remedy—Irreparable Injury—Practice.

In an action to restrain waste, the principal relief sought is that by injunction, and in such a case, where it appears to the court by conflicting affidavits that irreparable injury may follow a refusal to do so, the injunction should be continued to the hearing.

APPEAL from the order of *Ward, J.*, continuing an injunction to the hearing, heard at chambers in Hendersonville, 23 May, 1910. From FRANKLIN.

William H. Ruffin, Spruill & Holding, and W. H. Yarborough, Jr., for plaintiff.

W. M. Person, T. T. Hicks, and Bickett & White for defendant.

WALKER, J. This is an application for an injunction to stay waste. The court enjoined the defendant until the hearing, and he appealed.

There was a difference, under the old practice, between a common injunction, as for instance, one to restrain the collection of a money judgment because of an alleged equity against its execution, and one of a special nature in which the injunction is the principal relief demanded, and when, if the defendant is allowed to proceed unrestrained, the damages will be irreparable. In the former case, the injunction was dissolved, as a matter of course, upon the coming in of the answer to the bill, unless the equity was confessed, or, according to our practice, unless the answer was defective in not responding to a material allegation, or was unfair or evasive, so that exceptions to it would lie. In the latter class, a different rule prevailed, because a dissolution of the injunction would allow the injury to be done, and if the defendant denied the allegations of the bill, it could be read as an affidavit on the part of the complainant, the result being that if, upon the whole case, the matter was left in doubt, the injunction was continued to the hearing, so as to afford the complainant opportunity to support his bill by proof, before the injurious act is committed, which would deprive him of all remedy. *Lloyd v. Heath,* 45 N. C., 39; *Capeheart v. Mhoon, ibid.,* 31; *Wright v. Grist, ibid.,* 203. It is held in those cases that an injunction to stay waste is special, and in passing upon a motion for its continuance to the hearing, which is the matter now before us, we must be governed by the rule just stated. We have, therefore, carefully examined the pleadings and affidavits of the respective parties, for the simple purpose of ascertaining the nature of the dispute, and finding that, upon a consideration of the whole case, the question raised is made doubtful by the conflicting pleadings and affidavits, we follow the usual rule and affirm the decision of the judge continuing the injunction. We do not express or even intimate an opinion as to the merits of the controversy or the preponderance of the proof in its present shape, but merely state our conclusion, that the defendant should be restrained until the facts can be found by a jury, or in any other way agreed upon by the parties. *Cobb v. Clegg,* 137 N. C., 153; *Troy v. Norment,* 55 N. C., 318; *Purnell v. Daniel,* 43 N. C., 9. In *Zeiger v.*

Stephenson, 153 N. C., 528, we continued an injunction against the transfer of stock, though not strictly or technically special, as it appeared that there was a *bona fide* controversy as to the facts, and that plaintiff might recover, even though his ownership of the stock was denied. In *Troy v. Norment, supra, Judge Nash* said that justice demanded such a course, for when there is nothing before the court but oath against oath, how can the chancellor's conscience be satisfactorily enlightened? There is one other important consideration. The defendants may not be injured, while the right of the plaintiff may be irretrievably lost. It may be that in this case the merits are with the defendants. They may have managed this farm according to the most approved methods of good husbandry, or what they are alleged to have done may have been required by a proper regard for the interests of the plaintiff, as well as their own. It may have improved the land and enhanced its value, instead of causing a lasting damage to the inheritance, and it may appear that the plaintiff is altogether in the wrong. *Norris v. Laws,* 150 N. C., 599. But these questions must be settled at the final hearing, and until then the *status quo* must be preserved.

We forbear any discussion of the facts for the further reason that it might prejudice one or the other of the parties in the trial of the case. The order of *Judge D. L. Ward* was clearly right, and is

Affirmed.

STANDARD SUPPLY COMPANY v. W. R. PERSON AND S. H. FINCH, PARTNERS, ET AL.

(Filed 29 March, 1911.)

1. **Contracts—Guarantor of Payment—Consideration—Statute of Frauds.**

In an action against a guarantor of payment of a debt of another it is not necessary, under the statute of frauds, that the consideration for the promise be contained in the writing.

2. **Same—Forbearance to Sue.**

A binding written contract to forbear suit on a valid claim, for a definite time, or expressed in language that the law would interpret as a reasonable time, constitutes a sufficient consideration to bind a guarantor to the payment of a debt of another.

3. **Same—Express Agreement—Promise.**

When at the instance or request of another, and on promise of payment by the latter, a creditor forbears to sue his debtor for a specified time, the one so promising is liable as a guarantor of payment.

4. **Same.**

In an action brought to recover of defendant a certain amount claimed to be due by him as a guarantor of payment of the debt of another, there was undisputed evidence of a correspondence between the parties, in which it appeared that defendant, after repudiating liability, wrote the plaintiff that "Just as soon as the dry-kiln is completed I will see that your bill is paid." The dry-kiln was completed before suit was brought, and acting upon the promise the plaintiff desisted and forbore to sue his debtor with reference to the amount in controversy: *Held*, (1) the promise was in writing, and sufficient under the statute of frauds; (2) the forbearance to sue was a sufficient consideration; (3) the defendant was liable for the debt as a guarantor of payment.

APPEAL from *Whedbee, J.*, at December Term, 1910, of NEW HANOVER.

Civil action, heard on exceptions to report of referee. On a former appeal in this cause, reported in 147 N. C., 106, it appeared that plaintiff, having an account for goods, sold and delivered, against S. H. Finch and W. R. Person for the amount of $611.46, sought to charge the defendant J. E. Person, the present appellant, as guarantor for a portion of said account. Issues were submitted to determine the controversy, and verdict was returned in favor of plaintiffs against S. H. Finch and W. R. Person for the entire amount and against J. E. Person as guarantor for $451.75 of the amount, and it seemed to appear otherwise in the record that this was the portion of the account which accrued prior to 10 May, 1906. The correspondence on which the liability of J. E. Person was made to rest was set forth as follows:

PIKEVILLE, N. C., 3 May, 1906.

STANDARD SUPPLY COMPANY,
Wilmington, N. C.

GENTLEMEN:—Yours of May 1st to hand. I pay out the money Finch & Person have in my hands as they direct. That is, all their drafts and checks are sent to the bank at Fremont and placed to my credit, and from that amount I pay out as they direct. So, if they draw a draft on me and do not have money enough to their credit to pay it, I do not pay until they do have. This is an arrangement of recent date. I have up to recently been paying their bills, regardless of whether they had anything to their credit or not. I find that, in order to make them more strict with their business, the responsibility of it must rest on their own shoulders from now on.

With this explanation, I trust my refusal to accept draft will be satisfactory to you. Respectfully, etc.,

J. E. PERSON.

That plaintiff in reply to said letter from J. E. Person wrote to him the following letter:

DR. J. E. PERSON, 4 May, 1906.
Pikeville, N. C.

DEAR SIR:—Our extension of credit to Finch & Person has been on the basis of a letter received from you, in which you stated that you were supporting this firm with your finances. We have depended entirely upon your responsibility in making accounts with them, knowing that you are perfectly responsible for any amounts which they would probably make in their joint interest. We shall have to ask you to reconsider your determination not to accept a paper from these parties, as we know nothing of their responsibility and should not have credited them to the extent we have unless we had felt authorized so to do from your letters. We would be glad to have you say whether you will accept a paper from them to sign and forward you, and which we are perfectly willing to make on the basis of one-half and three months, if you so desire, or whether you are unwilling to do this.

Yours very truly,
STANDARD SUPPLY COMPANY.

And in reply to that letter, received the following reply from J. E. Person:

MAGNOLIA, N. C., 10 May, 1906.

STANDARD SUPPLY COMPANY,
Wilmington, N. C.

GENTLEMEN:—Your letter of May 4th has been received. I am here at the mill of Finch & Person to see what progress they are making with their work. I find that the dry-kiln is not completed, and when it is, which will be soon, I think you will get your money sooner than to sign a paper or papers for the time mentioned in your letter. Just as soon as the dry-kiln gets in operation I will see that your bill is paid.

Respectfully, etc., J. E. PERSON.

That plaintiff, in reply to above letter, wrote J. E. Person the following letter:

DR. J. E. PERSON, 11 May, 1906.
Fremont, N. C.

DEAR SIR:—Your letter of May 10th is before us, and entirely satisfactory. We presumed that the proposition to make a paper would probably be a greater accommodation to Messrs. Finch & Person than to wait on them for an early settlement; but it would appear from your letter that your preference, which we presume is also theirs, is to have this paid in the ordinary way and after a short period.

Thanking you for your kindness in this matter, we are,

Yours very truly,
STANDARD SUPPLY COMPANY.

And J. E. Burr, president of plaintiff corporation, testifying for plaintiff on the former trial, after saying that the letters in question were written by J. E. Person, the alleged guarantor, stated further: "The account was allowed to run on the strength of Dr. Person's letter of 10 May, 1906." The case on the last appeal made out by counsel then states that the court charged the jury: "On the evidence, if believed, the defendants Finch & Person were liable for the full amount demanded, and on the second issue, as to J. E. Person, the amount due was $451.75, being the amount due on said account after the letter of J. E. Person was written on 10 May, 1906." On the facts in evidence this Court held there was error, saying: "The defendant J. E. Person is not liable for the former portion of the account (that before the letter of 10 May, 1906), for the lack of any valuable consideration for his promise," citing *Green v. Thornton,* 49 N. C., 230; "nor for the latter portion, because, in our opinion, the written correspondence relied upon for the purpose contains no evidence of a continuing guarantee, but by fair implication refers only to an account already made." Being in doubt, however, after a careful inspection of the record, as to what portion of the account had been charged against the defendant Person, and also as to the true and proper interpretation of the testimony of the witness Burr, that the account was allowed to run on the strength of Dr. Person's letters, etc., the Court decided that it was safer to award a new trial, that the facts might be more fully developed. Pursuant to this order, the cause again came on for hearing and by consent was referred to E. S. Martin, Esq., of the Wilmington bar, who heard the evidence, including the letters above set out and others, and further oral testimony of the witness Burr, and made report, finding that J. E. Person was responsible for that portion of the account accruing prior to the letter of 10 May, 1906. Exceptions were filed to the findings of fact and conclusions of law by the referee, and on the hearing below the court, without disturbing the findings of fact, held as a conclusion of law that, "There was no evidence of consideration to support the alleged promise of J. E. Person," and gave judgment that said J. E. Person go without day, and plaintiff excepted and appealed.

Meares & Ruark for plaintiff.
Rountree & Carr for defendant.

HOKE, J., after stating the case: On a former appeal in this cause, the Court having awarded a new trial for the reasons heretofore stated and the cause having been referred, the letters above set out, with other correspondence between the parties, were introduced, and the witness J. E. Burr, among other things, testified as follows: "That the letter of 11 May, 1906, was in reply to Dr. Person's letter to the company dated 10 May, 1906, and as a result of the letters referred to, the witness desisted from taking action with reference to collecting the account. That the plaintiff desisted from taking action to collect the account from Finch & Person because Dr. Person in his letter of 10 May led us to believe that he would see that our bill was paid as soon as the dry-kiln was in operation. That Dr. Person's letter of 10 May, 1906, was the cause or consideration which induced us to desist from taking any action looking to the collection of this account. That no part of this account which accrued prior to 10 May, 1906, has been paid." There was also admission by defendant on the hearing before the referee, "That the dry-kiln referred to in the letter of 10 May, 1906, was installed and put in operation 8 May, 1907, before the institution of the suit. Upon the testimony the referee, after finding the correspondence between the parties to be as stated, made additional findings of fact as follows: "That in consequence of the said letters to and from J. E. Person, the plaintiff forbore and desisted from taking action against the said firm of Finch & Person to collect the said account, as J. E. Person in and by his letter of 10 May, to plaintiff, led plaintiff to believe that he would see the said account of plaintiff against the said firm of Finch & Person paid as soon as the dry-kiln was in operation. And that said letter of 10 May, 1906, was the cause or consideration which induced the plaintiff to forbear and desist from taking any action to collect the said account owing it by Finch & Person.

"7. That the dry-kiln, hereinbefore mentioned in the letter from J. E. Person to plaintiff, dated 10 May, 1906, was installed and put in operation before the institution of this action on 27 May, 1907.

"8. That the amount of said account due and owing on 10 May, 1906, was $451.75, and that no part of the same has been paid, though demand for payment has been made on defendant J. E. Person by the plaintiff.

"9. That no part of the judgment recovered against the said W. R. Person and S. H. Finch, partners trading as Finch & Person, hereinbefore mentioned, has been paid."

And upon such facts we concur in his conclusion, "That there was a binding contract of guaranty on the part of the appellant J. E. Person, supported by a valuable and sufficient consideration, and that said appellant is lawfully due and owing the amount of the account accrued prior to the letter of 10 May, 1906."

The statute of frauds is not involved in the case, for the appellant's letter of 10 May, 1906, contains a definite promise to pay as soon as the dry-kiln gets in operation, and since the notable decision of *Miller v. Irvine,* 18 N. C., 103, it has been well understood that in this State the consideration for a promise need not be contained in the writing in order to satisfy the requirements of the statute. And on the question of consideration, it is very generally held that a binding contract to forbear suit on a valid claim, for a definite time, or expressed in language that the law would interpret as a reasonable time, constitutes a sufficient consideration for a guaranty. And an agreement with the promisor to forbear, followed by forbearance, for such time, would uphold the contract. *Howe v. Taggart,* 133 Mass., 284, and *Robinson v. Gould,* 65 Mass., 55. And by the weight of authority actual forbearance for such time without express agreement, but at the instance or request of the promisor, is sufficient. *Lowe v. Weatherly,* 20 N. C., 212-214; *Strong v. Sheffield,* 144 N. Y., 392; *Crears v. Hunter,* 19 L. R., Q. B. Div. (1887), 341; Clark on Contracts, 121 *et seq.;* Anson on Contracts, 97.

While the record in the former appeal left the matter in such uncertainty that the Court did not feel justified in making a final decision of the case, and while there is some doubt even now as to whether the letter of plaintiff of date 11 May amounts to a distinct and definite agreement not to sue, there is no longer room for construction that the correspondence, taken in connection with the full and definite statements of the witness Burr, establishes the proposition that there was actual forbearance to sue the debtors, and that this was at the instance and request of the appellant. We are of opinion, therefore, and so hold, that the testimony fully justified the findings of fact, and that on such findings there should be judgment entered against the guarantor for the amount ascertained to be due. His Honor below no doubt acted on his interpretation of the former opinion, which was expressed in terms somewhat positive in view of the fact that a new trial was to be awarded.

There is error and on the facts established, judgment will be entered for the plaintiff.

Reversed.

KINSTON COTTON MILLS v. ROCKY MOUNT HOSIERY COMPANY.

(Filed 29 March, 1911.)

1. **Contracts—Breach—Goods Sold—Damages—Admissions—Burden of Proof—Delivery—"Ready and Willing."**

   In an action to recover for a balance of goods sold under a contract, the answer admitted that defendant had received and paid for a part of the goods, alleging that he did so upon plaintiff's promise and assurance that the remainder would be of a certain standard quality: *Held*, to recover the contract price of the balance of goods, refused upon the allegation that they did not come up to the standard fixed by the contract, the plaintiff must show that it was ready and willing to deliver them, which was denied; and plaintiff's motion for judgment upon the admission in the answer, on the ground that the defendant could not refuse to accept the balance of the goods on account of defects in the goods already received, was properly denied.

2. **Contracts—Breach—Goods Sold—Damages—Defects—Evidence.**
The defense, in an action for damages on defendant's refusal to accept certain yarns, sold under contract, being that the yarns were defective, it was competent to show by plaintiff's correspondence in this case matters relating to such defects, in corroboration of defendant's witness; and, also, in reply to plaintiff's evidence that yarns of the character refused by defendant were sent to plaintiff's other customers without complaint made.

3. **Costs—Recovery—Several Causes of Action—Interpretation of Statutes.**
The matter of taxing costs against an unsuccessful litigant is regulated by statute, and thereunder the full cost should be taxed against a defendant when the plaintiff recovers in but one of several causes of action set out in his complaint. Revisal, sec. 1249.

APPEAL from *Whedbee, J.*, at November Term, 1910, of LENOIR.

Plaintiff commenced this action to recover $675.71 for breach of contract, as a first cause of action, and $187.50 for goods sold to the defendant, as a second cause of action. The defendant admitted the execution of the contract, denied a failure to perform on its part, and alleged a breach of the contract by the plaintiff, and demanded $350 damages on account of said breach.

It was admitted: "That on the .... day of November, 1908, the plaintiff made and entered into a contract with the defendant, by the terms of which the plaintiff agreed to sell to the defendant 50,000 pounds of No. 10 yarns, which the defendant agreed to accept and pay therefor 16 cents per pound for all of said yarns delivered prior to 1 April, 1909, and 16¼ cents for all yarns delivered after 1 April, 1909, the delivery of said yarns to begin December or early in January, 2 per cent off the purchase price made to be allowed defendant for cones, and 2 per cent for payments made within ten days after the shipment of each installment of yarns, and that the said yarns were to be delivered in the usual weekly quantities as called for by defendant."

The fifth paragraph of the complaint was as follows: "That up to 22 March, 1909, the plaintiff delivered to defendant under said contract 18,139 pounds of yarns, which defendant received and paid for under the terms of said contract." To which the defendant answered:

"Fifth. That in answer to fifth paragraph of the complaint, the defendant says that up to 22 March, 1909, it had received from the plaintiff, under said contract, 18,139 pounds of yarns, upon the promise and assurance by the plaintiff that it would furnish the balance of the yarns purchased from it in standard quality, and also upon such promise and assurance did the defendant receive and pay for the said yarns so received, and that payment was made for those received at the prices stated in said contract."

The following are the issues, with the responses thereto:

1. Did the plaintiff deliver and offer to deliver to the defendant yarns of the kind and quality contracted for? Answer: "No."

2. If "Yes" to the first issue, what damages, if any, has plaintiff sustained by reason of defendant's refusal to accept said yarns? Answer: "Nothing."

3. If "No" to first issue, what damages, if any, has defendant sustained by reason of plaintiff's failure to deliver yarns of the kind and quality contracted for? Answer: "Nothing."

4. In what amount, if anything, is defendant indebted to plaintiff on account of plaintiff's second cause of action? Answer: "One hundred and eighty-seven dollars and fifty cents."

Judgment was rendered in favor of the plaintiff for $187.50 and costs incurred in prosecuting the second cause of action. The plaintiff excepted and appealed.

Rouse & Land for plaintiff.
Loftin, Varser & Dawson for defendant.

ALLEN, J. We have examined each of the exceptions on which the plaintiff relies, and find no error except as to the judgment for costs. The plaintiff's motion for judgment upon the ground that the fifth paragraph of the answer was an admission that the defendant received 18,139 pounds of yarn upon the promise, by the plaintiff, to furnish the remainder of the yarns of standard quality, and that therefore it could not refuse to receive such remainder on account of defects in those already received, was properly denied, because it was incumbent on the plaintiff to establish performance of the contract on its part, and the defendant denied, in its answer, that the plaintiff was ready and willing to deliver the remainder of said yarns, or that it had offered to do so.

There are nine exceptions to evidence, but they present no new questions requiring discussion. The witness of the plaintiff, Mr. Taylor, was permitted to testify to the facts at first excluded, and the evidence of the witness of the defendant, Andrews, was competent in support of the defendant's contention. The yarns and stockings exhibited to the jury by Andrews, while not identified by him, were identified by another witness, Walton.

The correspondence between the president of the Algoden Mills and the plaintiff, showing complaints as to the quality of the yarns shipped by the plaintiff to said mills, was competent, we think, as corroborative of the evidence of the defendant that the plaintiff was manufacturing defective yarns, and also in reply to the evidence of the president of the plaintiff that, "The same yarn that was sent to the Enfield and Rocky Mount mills was sent to other customers. The yarn that was sent to them to be tried was sent back and was used by other customers; there was nothing done to change the quality of the yarn, and it was shipped out to other customers using the same yarn, and no complaints."

The rule adopted by his Honor as to costs is fair and just, as in this case the plaintiff alleged two causes of action, and recovered on one; but it seems to be contrary to the authorities in this State. At common law neither party recovered costs, and with us it is dependent on the words of the statute.

The question was fully considered in *Costin v. Baxter,* 29 N. C., 112. In that case "the plaintiff's declaration contained three counts; the first two in *assumpsit* and the last in trover. No evidence was offered by him on the first and second, and on motion he was permitted to enter a *nolle prosequi* upon them, and confined his testimony to the third. His right to enter the *nol. pros.* was denied by the defendant, and the motion opposed. The jury returned a verdict for the plaintiff, and the court rendered judgment in his favor for the damages and costs of suit. The defendant tendered the witnesses he had summoned, in his defense upon the first and second counts, and moved his Honor for a judgment against the plaintiff for the amount of his costs. It was admitted that upon those counts their testimony was relevant, and not upon the third. The defendant's motion was overruled by the court." The judgment was affirmed, and *Chief Justice Ruffin* says: "A verdict and judgment were given for the plaintiff on one count in his declaration; and the defendant moved for judgment against the plaintiff for costs incurred by the defendant in the attendance of witnesses to prove his defense to other counts, in which the plaintiff had entered a *nolle prosequi.* The court refused the motion, and the defendant appealed. The question depends entirely upon the statute. The Revised Statute, ch. 31, sec. 79, taken from the act of 1777, ch. 115, sec. 90, is that, 'In all actions whatsoever the party in whose favor judgment shall be given, or, in case of a nonsuit, dismission or discontinuance, the defendant, shall be entitled to full costs, unless when it may be otherwise directed by statute.' The words are as plain and positive as they can be, and are decisive against the defendant. . . . Such being the plain provision of the law, a court ought not, upon any notion of its injustice, to thwart the legislative will. The Court does not undertake to form any opinion of its justice or injustice, as our duty is merely to execute the act in its obvious sense."

In *Wooley v. Robinson,* 52 N. C., 30, which was an action to recover several articles of personal property, in which the plaintiff recovered a part of the property, it was held that the defendant could not recover the costs of witnesses examined solely as to the property not recovered by the plaintiff.

In *Cook v. Patterson,* 103 N. C., 127, a mortgagor applied for a restraining order, alleging that the debt secured by the mortgage was usurious, and upon the trial this issue was found in his favor; but a part of the debt being unpaid, the defendant recovered judgment, and it was held that he was entitled to a judgment for costs.

The cases of *Costin v. Baxter* and *Wooley v. Robinson, supra,* are cited with approval, and the Court says in reference to them: "The older statutes, construed by the Court in those two cases, do not differ materially, so far as the question before us is involved, from section 528," Section 528 of The Code (1883) is identical with section 1249 of the Revisal.

In *Horton v. Horne,* 99 N. C., 221, the plaintiff recovered a part of the personal property sued for, and it was decided that he was entitled to recover full costs.

In *Wooten v. Walters,* 110 N. C., 252, the plaintiff recovered a store lot and failed to recover a stock of goods, and judgment awarding full costs to the plaintiff was affirmed. The trend of the decisions in *Williams v. Hughes,* 139 N. C., 20, and in *Vanderbilt v. Johnson,* 141 N. C., 372, is to the same effect. The question is discussed and many authorities cited in *Hobbs v. R. R.,* 151 N. C., 136.

We conclude, therefore, that the plaintiff was entitled to recover its costs. The controversy between the plaintiff and defendant is largely one of fact, which it was the province of the jury to settle. The judgment will be modified to tax the defendant with all legal costs, and, as thus modified, is affirmed.

Modified and affirmed.

W. H. BREWER v. J. S. WYNNE and J. P. STELL.

(Filed 5 April, 1911.)

1. **Pleadings—Demurrer—Allegations Construed.**

Upon demurrer to a complaint the allegations in the latter pleadings are to be accepted by the court as true, and if any portion of it, to any extent, states a cause of action, or a cause of action can be fairly gathered from it, the demurrer will be held as bad; for under our Code system of pleading the allegations must be liberally construed in favor of the one pleading them, to the end that substantial justice be done.

2. Same—Officers.

When the complaint in an action for damages for unlawful arrest alleges the wrongful acts to be committed by defendants, as individuals, and not in their capacity as officers of a municipal corporation, a demurrer is held as bad which is based upon the position that the defendants were not acting in their individual capacity, but as officers of an incorporated city.

3. Same.

A complaint states a cause of action which alleges damages for an unlawful arrest and assault by defendants without warrant or lawful complaint, and a demurrer is bad which is based upon the defense that defendants were acting as officers of an incorporated city, when the complaint alleges their acts as individual ones.

APPEAL by defendant from *Cooke, J.*, at October Term, 1910, of WAKE.

This is an appeal from a judgment overruling a demurrer to the complaint.

The complaint is as follows:

"The plaintiff, complaining of the defendants, alleges:

"That on 16 February, 1910, while the plaintiff was engaged in the conduct of his business, in the city of Raleigh, said county and State, the defendants, J. S. Wynne and J. P. Stell, without any lawful complaint or warrant, unlawfully and wrongfully, with force and arms, assaulted the plaintiff and procured and caused the arrest of and assisted in the arrest of the plaintiff, and then and there unlawfully, wrongfully, and forcibly imprisoned him in the common prison of said city, and there detained him in imprisonment for the space of one-half hour.

"2. That no warrant was ever issued thereafter charging the plaintiff with any offense, and when the matter came on to be heard before Alex. Stronach, Esq., the police justice of the city of Raleigh, on the following day, there being no warrant or charge or evidence against the plaintiff, a *nol. pros.* was entered by the said police justice and the plaintiff was discharged, which *nol. pros.* and discharge was prior to the institution of this action.

"3. That in unlawfully and wrongfully assaulting the plaintiff and procuring and causing the arrest and imprisonment of the plaintiff as aforesaid, and in unlawfully and wrongfully making said arrest and imprisonment, the said defendants acted with gross negligence, malice, insult, and willful oppression and without probable cause.

"4. That by reason of the aforesaid gross negligence, malice, insult, and oppression of the defendants in procuring and causing the arrest and imprisonment of the plaintiff as aforesaid, and in arresting and imprisoning the plaintiff as aforesaid, and by reason of said unlawful and wrongful assault, arrest, and imprisonment, he, the plaintiff, suffered great humiliation and injury to his feelings and also great mental and physical pain, loss of time from his occupation, as well as great injury to his name, reputation, and business, to his damage $25,000.

"Wherefore the plaintiff prays judgment against the defendants for the sum of $25,000 damages and for the costs of this action."

The defendants filed separate demurrers, but the same questions are raised in each, and the demurrer of the defendant Wynne alone is given:

"The defendant J. S. Wynne demurs to the complaint in this cause, upon the grounds:

"1. That said complaint does not state facts sufficient to constitute a cause of action.

"(*a*) In that the complaint alleges that the defendants J. S. Wynne and J. P. Stell 'unlawfully and wrongfully assaulted the plaintiff,' while engaged in his business, but fails to state any fact showing the nature of such business, or any facts showing that such assault, if there was any, was illegal; and the assault complained of is not sufficiently and legally set out, and the addition of vituperative words does not state facts sufficient to constitute a cause of action, and said defendant requests that this part of said complaint be stricken out and the action be dismissed at the cost of the plaintiff.

"(*b*) In that the complaint charges in general terms, with the addition of vituperative words, that the defendants 'procured and caused the arrest of' the plaintiff, but fails to state in what manner this procurement and causing of the said arrest (if any) of the plaintiff was illegal; and that the procurement and causing of the arrest complained of is not sufficiently and legally set out; and the defendant prays that this part of the complaint be stricken out and the action be dismissed at the cost of the plaintiff.

"(*c*) In that it charges in general terms, with the addition of vituperative words, that the defendants 'assisted in the arrest of the plaintiff,' but fails to state by whom such arrest (if any) was made and in what manner such arrest (if any) was illegal or in what manner the assistance in such arrest (if any) was illegal, or in what illegal manner the defendant assisted in such arrest (if any); and that the assistance complained of is not sufficiently and legally set out; and the defendant prays that this part of said complaint be stricken out and that this action be dismissed at the cost of the plaintiff.

"(*d*) In that the complaint alleges in general terms, with vituperative words, that the defendant 'imprisoned the plaintiff in the common prison of the said city and there detained him in imprisonment for the space of one-half hour'; but fails to state any facts showing in what character such imprisonment was made by such defendant (if there was any imprisonment), or that this imprisonment (if there was any) was illegal, or by whom the imprisonment (if any) was made, and that such imprisonment (if made) was illegal; and that said imprisonment (if any) complained of is not sufficiently and legally set out; and the said defendant prays that this part of said complaint be stricken out and that this action be dismissed at the cost of the plaintiff.

"2. The said complaint is defective in the joinder of parties defendant, and there is a misjoinder of the parties defendant in that if the defendant J. P. Stell committed any illegal act which makes him responsible to the plaintiff, the defendant J. S. Wynne has committed no illegal act, as attempted to be alleged in this complaint, and is not responsible for any such act to the plaintiff.

"Wherefore the defendant J. S. Wynne prays that this action be dismissed and that the plaintiff be taxed with the costs of this action."

Armistead Jones & Son, Douglass, Lyon & Douglass, and Holding & Snow for plaintiff.

Walter Clark, Jr., and Jones & Bailey for defendants.

ALLEN, J. It has been held in numerous cases in this State that a demurrer admits all of the allegations of the complaint (*Bond v. Wool,* 107 N. C., 139; *Loughran v. Giles,* 110 N. C., 426; *Merrimon v. Paving Co.,* 142 N. C., 539; *Wood v. Kincaid,* 144 N. C., 393), and the duty is imposed upon the courts by statute to construe the allegations liberally.

The law and the reasons for it are clearly and accurately stated by *Chief Justice Clark* in *Stokes v. Taylor,* 104 N. C., 395: "Under the common-law rules of pleading, the requirement of accuracy and precision was often pushed to the extreme. There have been cases where the rights of litigants were determined, not on the merits of the controversy, but on such technicalities as the pleader having unfortunately used the word 'had' in the past tense, instead of 'have' in the present tense. Even in the modern reports of Meeson and Welsby, instances of almost equal absurdity and refinement are to be found. These ideas were entirely abrogated in this country by the Codes of Civil Procedure wherever adopted. In England, after a series of improvements, beginning in 1834, when the celebrated 'Rules of Hilary Term' were adopted, the British Parliament has swept them out of the English law and has introduced the substance of the American Reformed Civil Procedure. Pomeroy Civil Remedies, sec. 509. The rule of the common law was that every pleading should be construed strongly against the pleader. The Code system is just the reverse. 'In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties' "; and by *Justice Walker* in *Blackmore v. Winders,* 144 N. C., 215: "The uniform rule prevailing under our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. Revisal, sec. 495. This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown,* 104 N. C., 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient."

Applying these principles to the allegations of the complaint, we think there was no error in overruling the demurrer.

The complaint alleges that while the plaintiff was at his place of business the defendants unlawfully and wrongfully assaulted him; that, without warrant or lawful complaint, they wrongfully and unlawfully arrested him, and then and there wrongfully and unlawfully imprisoned and detained him, and thereby caused him damage.

It may be that none of these allegations are true, but the demurrer admits their truth, and for the purposes of this appeal we must accept them as admitted facts, and as such no one can doubt that they constitute a cause of action.

The complaint in *Warren v. Boyd,* 120 N. C., 58, is similar to the one in this case, if we eliminate the allegation that Boyd was an officer, except more is alleged in this case. The action was to recover damages for false imprisonment, and the plaintiff alleged that he was arrested and imprisoned without legal process or color thereof, and in wanton and reckless disregard of his rights. *Chief Justice Clark,* speaking for the Court, says: "The complaint further alleges that Boyd, acting as constable in and for said township and county, and under color of his office, arrested the relator and imprisoned him, and that such arrest and imprisonment was without legal process or color thereof, *i. e.*, was illegal and without authority of law, and was in wanton and reckless disregard of his rights, *all of which are admitted by the demurrer.*"

The complaint was held to be good, although it appeared therefrom that the defendant was acting as an officer at the time of the alleged arrest and imprisonment.

It was suggested on the argument that the defendants in this case were acting as officers at the time of the acts complained of, but we cannot consider this, as it does not appear on the record, and the complaint purports to sue them as individuals. If true, the defendants can, of course, set up their official position and authority in justification.

A learned and instructive note on the civil liability of officers for false imprisonment will be found in vol. 4, Am. and Eng. Anno. Cases, 325.

The second ground of demurrer is equally untenable. The complaint contains the same allegations against both defendants, and if it states a cause of action as to one defendant, it does so as to both.

We find no error.

Affirmed.

ELBERT ANDREWS v. J. S. WYNNE AND J. P. STELL, APPELLANTS.

(Filed 5 April, 1911.)

For digest, see *Brewer v. Wynne, supra.*

Armistead Jones & Son, Douglass, Lyon & Douglass, and Holding & Snow for plaintiff.

Walter Clark, Jr., and Jones & Bailey for defendants.

ALLEN, J. This case presents the same questions decided in *Brewer v. Wynne and Stell.*

We find no error.

Affirmed.

J. SHERWOOD UPCHURCH v. J. S. WYNNE AND J. P. STELL, APPELLANTS.

(Filed 5 April, 1911.)

For digest, see *Brewer v. Wynne, supra.*

Armistead Jones & Son, Douglass, Lyon & Douglass, and Holding & Snow for plaintiff.

Walter Clark, Jr., and Jones & Bailey for defendants.

ALLEN, J. This case presents the same questions decided in *Brewer v. Wynne and Stell.*

We find no error.

Affirmed.

P. C. NORRIS v. HOLT-MORGAN MILLS.

(Filed 5 April, 1911.)

1. **Jurors—Employees—Indemnity Company—Incompetency.**
   When it appears that a casualty company has indemnified the defendant against loss for personal injuries to the employees, and that plaintiff's alleged cause of action is covered by the policy, it is a cause of challenge if the jurors are interested as agent, or otherwise, in the indemnity company.

2. **Jurors—Questions Asked—Exhaust Challenges—Harmless Error.**
   Questions asked the jurors by plaintiff in selecting them upon the trial, as to whether they were interested, etc., in defendant's indemnity company, held at least harmless error, as no juror was excused by reason of the questions asked and the defendant did not exhaust its peremptory challenges.

3. **Negligence—Defective Machinery—Subsequent Defects—Evidence.**
   When the defendant has testified, in an action by its employee for damages alleged from the furnishing and use of a defective machine, that the machine had not been changed since the injury and no other injury had been thereby inflicted, it is competent for the plaintiff to show, as evidence of defendant's negligence, that the defect still exists.

4. **Negligence—Master and Servant—Safe Place to Work—Safe Appliances—Evidence—Assumption of Risks—Questions for Jury.**

The plaintiff was employed to pack lint cotton in defendant's packing-room at its cotton mills as it was blown there with the use of steam fans, the room being 7 feet wide, 14 feet long and 14 feet high. There was evidence tending to show that the door to this room was negligently bolted from the outside, and that through the negligence of the defendant in not keeping the oil cups of the engine in proper repair and in not securely fastening the engine, the lint cotton caught afire while plaintiff was at work, to his damage; that he had to force open the door, as no one heard his calls; that while fire from the ignited cotton covered the room he had to dig down through the cotton to the door, which should have been opened from the inside, and that to get out it was customary to call to employees on the outside; that the machinery had not been inspected during the six months of plaintiff's employment; that another like machine used by defendant did not shake while in operation; and that the fire originated at the bearings of the defective machine, and that lint cotton was on the machinery and connecting pipes. The judge correctly charged upon the questions of *res ipsa loquitur*, of accident, of the duty of the master to furnish his servant a safe place to work, of the master's duty to furnish and inspect the appliances used, and it is *Held*, (1) the evidence is sufficient to go to the jury upon the question of defendant's negligence; (2) that an employee does not assume the risk of an injury caused by the failure of the master to perform a duty imposed on him by law, in furnishing a safe place to work, and this duty cannot be delegated to another so as to exempt the master from liability.

APPEAL by defendant from *Cooke, J.*, at November Term, 1910, of HARNETT.

The plaintiff, an employee of the defendant, brought this action to recover damages for personal injuries, alleging that the defendant failed to furnish him a reasonably safe place to work, that the machinery of the defendant was defective, that the defendant failed to inspect it, and failed to instruct and warn him. The defendant denied that it was negligent; alleged that if the plaintiff was injured by the negligence of any one, it was by the negligence of a fellow-servant; that if the defendant was negligent, this negligence was not the cause of the injury; that the injury was the result of an accident, and that the plaintiff assumed the risk thereof. The defendant appeals from a judgment in favor of the plaintiff.

There was evidence on the part of the plaintiff tending to show that in March, 1908, and for six months prior thereto, plaintiff was employed by defendant to work in its dye-house, and among other things it was his duty to pack lint cotton into packing-rooms connected with said house, as the same was blown from the dyeing-rooms into the packing-rooms by means of a fan. These packing or storing rooms were about 7 feet wide, 14 to 16 feet long and 14 feet or more in height. The bleached or dried cotton was blown in the top of the room, and the doors of the packing-rooms were kept closed. Formerly, cotton had been put into these rooms by hand. It was carried by hand into each room through the door. After the fan was installed, it became necessary to close the door of each room, in order to prevent the draft blowing the cotton out. Under the old system, the doors were bolted from the outside, and after the fan was installed no change was made in this particular and no other doors were added. The plaintiff and others assigned to work in the packing-room entered the door, which was then closed and bolted by some of the employees on the outside. The packer remained in the room packing the cotton until the room was filled. He then knocked or kicked against the wall of the room, scratched a hole through the cotton, and was let out the door by some operative. This was the rule and custom of the defendant.

On the morning of the plaintiff's injury he was assigned to work in the packing-room. The cotton which was first blown in had been taken from the drying-rooms the evening before and had cooled. After this had been blown in, the defendant commenced blowing in warm cotton, which was removed from the drying-rooms that morning. At that time the cotton had been packed to a depth of 4½ feet. Plaintiff, following the usual custom, had cotton over his eyes and nose to keep out the dust, and was on his knees, rolling the cotton back, when he heard an unusual sound about him. At once he discovered the cotton in the room was afire, and the blaze had flashed over him. He endeavored to get to the door. It was bolted from the outside; he called for help. In order to protect them he closed his eyes, and endeavored to reach the door, which was the only exit. The cotton was 4 or 4½ feet high, and piled against the door. The fire was all over the room. No one opened the door or answered his call for assistance. Being almost strangled by the fire, he ran against the door with his head and hands and burst it open by forcing out the staple which held it on the outside. That the bearings had before become heated on account of defective construction, want of repair, and failure to inspect; that defendant failed to warn and caution against danger; that the fan in operation at the time of plaintiff's injury was bolted to 2-inch flooring, the floor was unsteady, and would shake; that this jarring or shaking of the bolts and taps would cause them to become loose; that the bearings of the fan were usually covered with lint cotton; that the fan used was known as "The Buffalo Forge Company's" make. A cut of the same was introduced in evidence, and, among other things, showed two oil cups on the bearings of the fan for the purpose of oiling them. These cups were in plain view, and when kept on the fan disclosed the absence or presence of oil. When the oil cups were used, they served as a guage by which those operating the machine knew when more oil was needed. There was evidence tending to show that one of the oil cups, at the time of the injury and prior thereto, for months had been off the fan, and the other one so broken or worn down that it would not retain oil; that instead of placing oil in the cups, the machinery was oiled through the holes leading into the bearings. The oil would waste on the floor and there was no guage; that in the defendant's mill was another fan bolted on a concrete foundation. This eliminated or lessened the vibration. That the fan to which plaintiff attributed his injury rattled and was not firmly placed; that the sparks seen at the time of the injury were near the ends of the bearings.

The defendant offered evidence tending to prove that the plaintiff was employed, among other things, to pack cotton in the storage-rooms; that the cotton was not delivered in the said room while hot; that there was no such friction in the fans or pipes as to cause ignition; that the fan and machinery were not defective or out of repair or antiquated, but were such as are approved and in general use; that the fan was bolted firmly to a 2-inch floor, and that while there was a vibration which caused the pipe to rattle, it was only such as is common to fans similarly secured, and that this fan was secured in the customary manner; that the method of delivering cotton used by the defendant has been universally adopted and is considered safe and prudent by the cotton mills of the country.

That the defendant was not guilty of negligence in adopting the modern method of transferring cotton from one room to another, which has been generally adopted. That the only precaution which the defendant could have taken was to altogether discontinue this mode of transferring cotton and return to the old mode of moving it by hand, or to provide a door with a latch inside; that as the door in this instance proved no obstruction, no injury was suffered by reason of its being fastened on the outside; that if there had been a latch on the inside, it would have been impossible for the plaintiff to have found it, because, surrounded by fire in the air and everywhere, he could not look for it and the latch would have been hid by the cotton; that the fan and machinery were in good condition and in good running order at the time of the accident; that the bearings of the fan were at that time well oiled; that the oil cups to the fan were there; but if, as contended by the plaintiff, they had been removed, the holes from which the oil cups were taken were efficiently used in oiling the bearings; that the oil chambers were large enough to hold oil for lubrication many days, but that it was the rule and practice to fill them every morning; that the bearings of the fan were not heated at the time of the accident, but that if they were, it was caused by the negligence of a fellow-servant, whose duty it was to lubricate every morning when the fan was started; that the bearings were not loose or out of order and never had been, but if they were so at the time of the accident, it was through the negligence of a fellow-servant, whose duty it was to keep the same in order or to report it to the machinist, who was charged with the operation of the fan; that if the machinist neglected to tighten the nuts and bolts and the bearings which may have become loose in the operation of the machine, or to oil the bearings so as to prevent friction and sparks and fire, he was but a fellow-servant with the plaintiff, and this was but the negligence of a fellow-servant; that there never had been any trouble in the operation of the fan or machinery; that the accident was not anticipated, and could not be reasonably anticipated; that the fan and machinery had been regularly and frequently inspected and that they were always found to be in good running order; that the bearings had never heated or become loose; that the fan was taken apart on the next work day after the accident and found to be in perfect condition, the oil wells supplied with oil, the bearings thoroughly lubricated and in good order, and that they have been operated ever since without repairs or alterations; that the hood or covering of the fan is so tight, and the box of the journal in which the axle of the fan works so closely fitting that it was impossible for fire to get into the fan from the outside; that the slight fastening of the door was no impediment to the egress of the plaintiff at the time of the accident; that he was on the opposite side of the room, kneeling down with his face and eyes covered with cotton, and that his injury was suffered before he got to the door, and was in no way attributable to the fastening of the door; that the plaintiff had no difficulty in getting out; that the door opened immediately when he pushed against it; that it was not negligence in any view of the case for the defendant to bolt the door, because the plaintiff himself proved that it was the rule and custom for the men who were working just outside of the door to open it whenever notified by the inside worker; that this was the safer method; and if they failed, it was the negligence of fellow-servants; that the plaintiff knew all the conditions and all the dangers, if any, to which he was exposed; that he knew just as well as the defendant the danger from an accidental fire, without being warned, and that he voluntarily assumed the risk attending his employment.

Manning & Everett, J. C. Clifford, and Bryant & Brogden for plaintiff.

J. W. Hinsdale, H. E. Norris, and R. L. Godwin for defendant.

ALLEN, J., after stating the case: We have been aided very much in the examination of this case by the full statement of facts contained in the briefs of the appellant and the appellee. Rule 34 requires the appellant to make such statement in his brief, and its observance in all cases would do much to quiet the complaint sometimes heard that some fact has been overlooked.

The exceptions are numerous, but it is unnecessary to discuss each one of them, as many involve the same question. The exception to the question asked the jurors, "Is there any member of the jury who has an interest as agent, or otherwise, in the Maryland Casualty Company, an insurance company?" is without merit. We must assume the question was asked in good faith, and the defendant says in its brief: "The Maryland Casualty Company had insured the defendant in respect to the plaintiff's accident."

In *Blevins v. Cotton Mills,* 150 N. C., 497, it was held that an employee of the defendant was incompetent as a juror, and the Casualty Company was practically a defendant. In any event, it does not appear that the question prejudiced the cause of the defendant. No person was excused on account of his connection with the Casualty Company, and the defendant did not exhaust its challenges.

The evidence of the absence of the oil cups after the injury would ordinarily be incompetent, but it was made competent in this case by the evidence of the defendant that the machinery had not been changed, and that the oil cups were on the machinery at the time of the injury and at the trial. *Tise v. Thomasville,* 151 N. C., 282.

The defendant resisted a recovery principally on the following grounds:

(1) That the fact that the door was fastened on the outside was not the proximate cause of the injury, contending, on the

plaintiff's evidence, that he had no difficulty in getting out, and was not delayed by the manner of fastening the door.

(2) That if the room in which the plaintiff was working was unsafe, this was not the cause of his injury, and that the real cause was an accidental fire.

(3) That if the fire was the result of negligence, it was the negligence of a fellow-servant, for which the defendant would not be liable.

(4) That if plaintiff was delayed in leaving the room, it was because of the negligence of a fellow-servant in failing to open the door when he called.

(5) That the fire was accidental.

(6) That the plaintiff assumed the risk.

(7) That there was no evidence of negligence.

All of these contentions, except the last, are dependent upon the findings of the jury, and we think his Honor submitted them to the jury under instructions of which the defendant cannot complain.

After stating the duties imposed upon the plaintiff and defendant, he explained the meaning of the term "accident," and instructed the jury that the plaintiff could not recover if his injuries were the result of an accident; that the doctrine of *res ipsa loquitur* did not apply and that the burden was on the plaintiff to prove that the defendant was negligent and that this negligence was the proximate cause of his injury; that proof of an accident was not proof of negligence; that if the fire was caused by the negligence of a fellow-servant in failing to lubricate the machinery, the plaintiff could not recover; that if the fan was of approved make and such as was in general use, and was frequently inspected by the defendant and no defect was discovered or could be discovered by a reasonably careful inspection, and that the defendant did not know of any defect in the fan, and that the fire originated in the fan from an unknown cause or through the negligence of a fellow-servant, there would be no actionable negligence; that the defendant would not be responsible for failure to discover a latent defect in the fan; that there was no evidence that the defendant was negligent in the preparation of the cotton and the feeding it into the pipes for delivery through the fan into the storeroom; that if the fan and the apparatus for delivering cotton in the storage-room were of standard make, known and approved and in general use, the defendant was not negligent in respect to furnishing said fan and apparatus, although there was a fan of later and more improved make which was frequently used; that if such fans occasionally got hot from rapid revolutions, but not hot enough to ignite cotton, it was not negligence to continue the use; that if fans like the one used by the defendant usually vibrate and make noises as described by the plaintiff, but perform their functions safely, this would not be evidence of a defective fan; that if the door of the storage-room was fastened, but the fastening did not impede or prevent the plaintiff from emerging from the room, the fastening of the door would not render the defendant liable; that the defendant was not required to provide against a possible accident which would not be expected or foreseen by a reasonably prudent man; that it was as much the duty of the plaintiff as of the defendant to anticipate an accidental fire; that if the fan had been operated ten years without getting out of order or accident, and had been operated without repairs and no accident since the injury to the plaintiff, this would be evidence that the defendant had no notice of a defect in the fan, if it existed, and that the fan was not defective; that if plaintiff knew of the conditions, the defendant was not required to warn him; that if defendant failed to provide the plaintiff a safe place to work and the plaintiff had equal knowledge with the defendant, or the same opportunity of discovering the dangerous position or liability to risk he would occupy in his employment, the plaintiff assumed the risk as to the place where he was working.

We also think there was evidence of negligence to be submitted to the jury.

The brief of the appellee, from which we quote, states with accuracy the duties imposed upon the employer.

"It is universally held at this day that it is the master's duty to furnish the servant reasonably safe machinery. If he fails to do so he exposes the servant to extraordinary risks and hazards. The failure to exercise due care in furnishing such machinery is a breach of duty which the master owes the servant." *Moore v. R. R.,* 141 N. C., 113.

"It is accepted law in North Carolina that an employer of labor to assist in the operation of railways, mills, and other plants where the machinery is more or less complicated, and more especially when drawn by mechanical power, is required to provide for his employees, in the exercise of proper care, a reasonably safe place to work, and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character; and an employer is also required to keep such machinery in such condition, as far as this can be done in the exercise of proper care and diligence." *Hicks v. Mfg. Co.,* 138 N. C., 325-326.

"Where there is evidence tending to show that an injured employee did not have a reasonably safe place to work, or was not instructed as to the danger attending the act he was told to do, the question whether it was a reasonably safe place to work or whether the failure to warn him of the danger was the proximate cause of the injury should be submitted to a jury. The evidence that there was a safe way to do this act did not warrant the withdrawal of the case from the jury in view of the evidence in the case. When more than one inference can be drawn as to the negligence or proximate cause, it is for the jury to determine. *Dorsett v. Mfg. Co.,* 131 N. C., 254; *Marks v. Cotton Mills,* 138 N. C., 401." *Holton v. Lumber Co.,* 152 N. C., 69.

"It is the negligence of the employer in not providing for his employees safe machinery and a reasonably safe place in which to work that renders him liable for any resulting injury to them, and this negligence consists in his failure to adopt and use the approved appliances which are in general use and necessary to the safety of the employees in the performance of their duties; and this rule applies, it is said, even as between carrier and passenger." *Marks v. Cotton Mills,* 135 N. C., 290.

"A master owes to a servant the duty to carefully inspect, at reasonable intervals, the machinery, ways, and appliances provided for the use of the servant in the performance of his work, and it is not essential to his liability for an injury to the servant that he should actually know of the defect causing the injury." *West v. Tanning Co., ante,* 44 (69 S. E., 687); *Womble v. Grocery Co.,* 135 N. C., 486.

"Generally speaking, an employer is bound to warn and instruct his employee concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are undiscoverable by them in the exercise of such ordinary and reasonable care as in their situation they may be expected and required to take for their own safety, or concerning such dangers as are not probably appreciated by them, by reason of their lack of experience, their youth, or through general incompetency, or ignorance; and unless the servant is so warned or instructed, he does not assume the risk of such dangers; but if he receives an injury without fault on his part, in consequence of not having received a suitable warning or instruction, the master is bound to indemnify him therefor." Thompson on Negligence, sec. 4055.

There was evidence of a failure to perform these duties, and this is negligence. The plaintiff offered evidence that he had been in the employment of the defendant six months and had not known the machinery to be inspected and had not been warned of danger; that the machinery was bolted to 2-inch flooring and that the flooring was unsteady; that another machine used by the defendant was on a concrete floor and did not shake; that when the machinery was installed there were two oil cups fastened to it as a part of it, which oiled it automatically to avoid friction, and that one of these cups was gone and the other broken; that these oil cups, when on the machine, oiled the bearings; that the fire originated at the bearings; that fine lint cotton was on the pipes and machinery;

that plaintiff was required to work in a room bolted on the outside, and that the only mode of exit after completing his work was to burrow through two or three feet of cotton to the door and wait until some one from the outside heard him and opened the door.

The charge to the jury was, we think, in some respects more favorable to the defendant than it was entitled to, and particularly as to the doctrine of assumption of risk, as the employee never assumes the risk of an injury caused by the failure of the employer to perform a duty which he cannot delegate, and the duty to provide a reasonably safe place to work is one of them.

We find no error in the trial.

No error.

ED. M. BRYAN v. HILTON LUMBER COMPANY.

(Filed 5 April, 1911.)

Master and Servant—Defective Machine—Contributory Negligence—Evidence—Instructions.

In an action by an employee to recover damages of his employer for a personal injury received in operating a planing machine in defendant's mill, there was evidence tending to show that the machine had revolving cogs operated by steam power, which were left unboxed and exposed, and that a feed gear or shift by which the power was applied and shut off was defective, all of which had been called to defendant's attention. The plaintiff admitted the necessity of shutting off the power before attempting to relieve a choked condition of the machine, and there was contradictory evidence as to whether he waited, after shutting off the power, until the wheels stopped revolving, before attempting to clear the machine, wherein the injury was inflicted: *Held*, the conflict of evidence presented an issue of fact to the jury, and it was error to refuse to instruct the jury that plaintiff was guilty of contributory negligence, should they find that he placed his hand in the machine before the cogs stopped revolving, after he had shut off the motive power, and was thereby injured.

APPEAL from *Whedbee, J.,* at October Term, 1910, of NEW HANOVER.

Civil action, brought to recover damages for a personal injury received by plaintiff in operating a planing machine in defendant's mill. The usual issues of negligence, contributory negligence, and damage were submitted to the jury and answered in favor of the plaintiff. From the judgment rendered, the defendant appealed.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

John D. Bellamy & Son and George L. Peschau for plaintiff.
Davis & Davis and E. K. Bryan for defendant.

BROWN, J. The plaintiff was an employee of the defendant and engaged in operating a planing machine used in planing planks, and while so engaged his hand and arm were drawn into the cogwheels and severely injured.

The grounds of negligence alleged in the complaint and supported by evidence are that the cogs to the machine were negligently left by defendant unboxed and that the feed gear or shift by which the power was applied and shut off was defective; that defendant's attention was called to the defective feed gear some time before the accident, and defendant negligently omitted to repair it.

The plaintiff gives this account of his injury and how it occurred: "I was feeding the machine with boards, and when one went through it broke up some pieces off one end—I guess, of the board—and that choked it up so I couldn't get a board through it, and I shut off the feed gear and waited until it stopped before I went around to remove the choke. I pulled the lever back, and that released it from running—released the cogwheels from rolling. When I pulled the lever back, that had the effect of running the cogwheels; when you pulled the lever back it released the feed gear so that it would not run. It did this by taking the pressure off of the shafting. It worked with a feed clutch and stopped the machine. The pulling of the lever released the belt so that it was not tight enough to run the feed gear. After the cogs stopped I went around to remove the choke on the left-hand side. It had a large cog on the right-hand side to prevent one from reaching over to remove the choke from the machine. There was no way of getting to that part of the machine to unchoke it except the way I did—to lean over the cogs. I had to stand on tiptoe to reach over the machine, it was so high. I went around to remove the choke. I took a small piece of board that was laying on the floor to raise up the chip breaker, trying to remove the board which had choked the machine, and while reaching over to remove it the cogs started up in some manner—I don't know what. I took a small piece of board and went to the place and lifted up the chip breaker, attempting to lift it up, and while I was over there attempting to remove the board the machine started up and the exposed cogwheels caught me by the coat sleeve and snapped my arm in it right at my elbow."

There is much evidence *pro* and *con* in the record as to whether boxed cogs were customary and in general use on such a machine, and in charging the jury on that feature of the case his Honor followed the uniform adjudications of this Court.

The defendant's witness, Alfred Robinson, gives a very different account as to how the plaintiff was injured. He testifies as follows: "I am 14 years old, and was working at the Hilton Lumber Company when Mr. Bryan was hurt. I saw him when he was hurt. He was feeding No. 4 machine. I was tying behind the machine at that time when he called me. I was at the other end of the machine. He called me to hold up the chip breaker. Mr. Bryan called me. When he called me, I got a little piece of flooring off of the floor to hold the chip breaker. A piece was partly under the chip breaker and partly under the roller, and he raised the roller a little bit to get it out. He raised it with his hand. He didn't have anything in his hand when he raised it. He reached over to get it one time, and jerked his hand out, and he reached over again, and he didn't pull it out any more. The rollers were running. They were turning both times he reached with his left hand. Both times he reached with his left hand. He reached over both times with the same hand. He was standing right side of me. I was standing between the chip breaker and the two rollers. He was standing south of me. He was right side of me. I was looking all around. I wasn't noticing him. I saw the rollers. The rollers stopped when he got hung. They did not run long. Time he got hung they stopped."

The defendant requested this prayer for instruction: "If the jury find that plaintiff raised the rollers and ascertained that there was a piece of board caught under the rollers of the chip breaker, and had Robinson hold the breaker up with a piece of wood and then shoved the lever so as to stop the rollers from feeding, but before the rollers stopped he put his hand in between the cogs and his sleeve was caught, he was guilty of contributory negligence, cannot recover, and you will answer the second issue 'Yes.'" To the failure to give such prayer defendant in apt time excepted.

A careful examination of the charge discloses that the prayer was not given, and no sufficient and proper instruction in lieu thereof.

The plaintiff, in his own testimony, admits that he knew the cogs were unboxed, for he could easily see them, and that before he undertook to take out the obstruction he threw off the power gear and let the machine stop. He states that the reason he was hurt was because the power gear shift was defective, and unexpectedly started up the cogwheels and machinery, while he had his hand under the machine removing the obstruction.

Just at this point there is a material difference between plaintiff's evidence and that of defendant's witness Robinson.

The defendant contends that, admitting, as plaintiff states, that he threw off the power gear and undertook to stop the machine, according to Robinson's evidence plaintiff did not wait for the machine to stop revolving and come to a standstill, but that he reached to get hold of the obstruction and jerked his hand out, and that while machine was still running he put his hand in a second time and got caught in the cogs, and that after plaintiff got hung the cogs stopped.

The defendant bases its prayer for instruction upon the admission of plaintiff that he undertook to stop the machine before removing the obstruction and upon the evidence of Robinson that plaintiff thrust his hand in twice before the machine stopped, and the second time he was caught in the running cogs.

It would seem to be clear that his Honor erred in refusing to give the prayer requested.

Assuming that the defendant was guilty of negligence in respect to the feed gear and in not boxing the cogs, yet it is patent that if the plaintiff undertook to stop the machine before removing the obstruction because he knew it was dangerous to do so without stopping it, ordinary prudence and common sense demanded that he wait until the revolutions ceased and the machine came to a standstill.

That is what Robinson's testimony shows the plaintiff did not do, and further that had he done so he would not have been injured. If his prudence dictated to him to release the power gear in order to stop the machine, it should have further prompted him to wait until it actually stopped.

This Court has repeatedly held that where there is a safe and a dangerous method available for the performance of his work, and the employee selects the latter method with knowledge of the fact that it is dangerous, he cannot recover for injuries sustained. *Whitson v. Wrenn,* 134 N. C., 86; *Covington v. Furniture Co.,* 138 N. C., 374. In the last-named case, which is somewhat like this, it is said: "A very slight consideration upon the part of the plaintiff, especially in view of his knowledge of the conditions and his experience in operating that machine, would have suggested retaining the plank for a few minutes until the machine could reassert itself and the danger pass away." See, also, *Carter v. Lumber Co.,* 129 N. C., 203.

Upon this view of the evidence, presented by the prayer, the plaintiff was guilty of great negligence, which was the immediate and direct cause of his injury.

Notwithstanding the defendant's negligence in failing to box the cogs or repair the feed gear, the plaintiff had the last chance to avoid the injury by waiting a few moments only for the revolutions to cease before removing the obstruction.

This brings his negligent act clearly within the idea of proximate cause as expressed by *Mr. Justice Allen,* who says: "Proximate cause means the dominant efficient cause, the cause without which the injury would not have occurred." *Harvell v. Lumber Co., ante,* 254.

Plaintiff's negligent conduct fills to the full measure the requirements of proximate cause as expressed by *Mr. Justice Hoke* in *Ramsbottom v. R. R.,* 138 N. C., 40: (1) It directly produced the result; (2) without it the injury would not have occurred, and (3) a person of ordinary prudence could see that injury was probable under the circumstances.

It must be admitted that if plaintiff's experience and prudence dictated to him to stop the motive power before venturing to remove the obstruction, ordinary prudence must dictate that he wait until the effect of the motive power had ceased and the machine had come to a standstill.

It may be that Robinson's version of the facts is not the true one and that plaintiff's is, and *vice versa;* but that was a matter for the jury to decide, and to that end the rejected prayer for instruction should have been given.

New trial.

R. O. JEFFRESS v. THE TOWN OF GREENVILLE.

(Filed 5 April, 1911.)

1. **Cities and Towns—Streets—Dedication and Acceptance—Implied—Acts of Parties.**

   An offer of dedication and acceptance of a way for a street in an incorporated town may be sufficiently evidenced by the acts of the owners of the land and the town authorities, and in this case the acts of dedication and acceptance held sufficient by the acts of the owners in acquiescing for years in the use of the *locus in quo* as a public street, in naming the street as boundaries to lands conveyed by the abutting owners, and by the acts of the incorporated town in paving the sidewalks of the street and maintaining it.

2. **Cities and Towns—Streets—Condemnation—Legislature—Inherent Powers—Constitutional Law.**

While there is no constitutional provision giving the Legislature power to condemn private lands for public purposes, the Legislature has an inherent right to do so, essential to the due exercise of the powers of government and to the promotion of the public welfare; and this power is practically unlimited, though subject to judicial control, if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken.

3. **Cities and Towns—Streets—Condemnation—Legislative Powers—Notice—Hearings—Ordinance.**

When the charter of an incorporated town expressly provides that the town authorities may at once enter upon the land and proceed with the proposed improvements, and that the filing of the petition for the purpose of compensating the landowners shall not have the effect of stopping or delaying the work, and just compensation to the owners is properly provided for, it is not necessary to the validity of condemnation proceedings conducted in pursuance of the act that the owners of the land be notified and allowed a hearing before the passage of an ordinance of the town directing the widening and improvement of the street.

4. **Cities and Towns—Streets—Condemnation—Assessments—Commence Work.**

It is not required that an appraisement be made of the land condemned by an incorporated town for the use of its public street, before taking the same and commencing work thereon, when the town acts under legislative authority in condemning the street, and there is sufficient provision for compensating the owners of the land.

5. **Cities and Towns—Streets—Condemnation—Public Use—Questions for Court—Necessity—Legislative Powers.**

When property is condemned for a public street, it is a taking for a public use, as a matter of law; but the question as to the necessity or expediency of devoting the property to the public use is one which is exclusively within the province of the legislative department.

6. **Cities and Towns—Streets—Condemnation—Shade Trees—Damnum Absque Injuria—Legislative Powers.**

When the charter of a town expressly confers authority to widen a street and to remove any and all obstructions therefrom, and also makes adequate provision for compensation to the owner of the property taken for the purpose, the town acting in good faith and in a careful exercise of the powers conferred is not liable to an abutting owner for removing shade trees from the street in front of his dwelling, for such acts are *damnum absque injuria.*

7. **Cities and Towns—Streets—Condemnation—Prior Legislative Acts—Interpretation of Statutes.**

A legislative act passed prior to the enactment of a charter of a town, in respect to condemnation proceedings, is repealed as to all matters in conflict with the charter; and condemnation proceedings for street purposes being had in accordance with the charter provisions are not affected by restrictions placed thereon by the prior act.

APPEAL from *Ward, J.,* refusing to continue a restraining order to the hearing, heard at chambers in Snow Hill, 6 December, 1910. From PITT.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Moore & Long for plaintiff.
F. N. Wooten and F. C. Harding for defendant.

WALKER, J. This action was brought to enjoin the defendant from cutting down a row of shade trees standing on the outer edge of the sidewalk in front of plaintiff's residence in Greenville, for the purpose of widening Fifth Street. The court, after having granted a temporary restraining order, refused to continue it to the final hearing, and the plaintiff appealed. In the complaint and also in the argument before us, the plaintiff bases his right to injunctive relief upon the following grounds:

(1) The defendant does not own any easement in or title to the strip of land now used as a sidewalk in front of the plaintiff's property along Fifth Street or in the street.

(2) The defendant town has not instituted condemnation proceedings, and the removal of the trees in question is without due process of law.

(3) The public interest does not demand the widening of Fifth Street, and the removal of the trees and the widening of the street, as ordered by the board of aldermen of the town of Greenville, is unnecessary.

(4) The plaintiff is entitled to have an appraisement of his damages before the trees are removed and the street is widened.

(5) The board of aldermen of the defendant town, in passing the order directing the widening of Fifth Street, which is set out in the defendant's answer in the record, are attempting "without due process of law, negligently, wantonly, and without necessary procedure, and carelessly, arbitrarily, capriciously, and oppressively to cut down and remove plaintiff's shade trees."

1. There is ample evidence in the case to show that the owners of the land abutting on what is called Fifth Street had dedicated the land embraced by it to the public use, for the purpose of a street, and that the town had accepted the offer of dedication by actual user for many years and exercising authority over it as one of its public thoroughfares. *S. v. Fisher,* 117 N. C., 733; *Smith v. Goldsboro,* 121 N. C., 350; *Gilbreath v. Greensboro,* 153 N. C., 396. The town has certainly treated the way, including the sidewalks, as a street, for the sidewalks were paved under its order and direction, and it has been known and used by the citizens and recognized by the town as Fifth Street, and lots belonging to the original owners of the fee in that street have been described in deeds conveying them to other parties as abutting on the street. Elliott on Roads and Streets, secs. 117 and 163; *Mayor v. Sheffield,* 71 U. S., 189; *Bailey v. Culver,* 12 Mo. App., 175; *Kirkman v. Mayor,* 55 S. W. Rep., 1072. It cannot be doubted, we think, that Fifth Street is one of the public ways of the town, if the evidence is credible.

2. It was not necessary that the plaintiff should have been notified and allowed a hearing before the order of the board directing that Fifth Street be widened and improved was passed. It may be regarded as settled law that the power to take private property for public uses belongs to every independent government exercising sovereign power, for it is a necessary incident to its sovereignty, and requires, therefore, no constitutional recognition. *U. S. v. Jones,* 109 U. S., 513. No provision for condemnation has ever been inserted in our

Constitution, but the right of eminent domain or the right to condemn private property for public uses has always been conceded as essential to the due exercise of the powers of government and to the promotion of the public welfare. Legislation in the exercise of this inherent power, though subject to judicial control, is said to be practically unlimited, if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken. *R. R. v. Davis,* 19 N. C., 451; *Lecombe v. R. R.,* 23 Wallace, 108. The mode of exercising the power of eminent domain, unless otherwise provided in the organic law, rests in the sound discretion of the Legislature, subject, however, to the principle just stated, that there must be sure and adequate provision for compensating the owner. *McIntire v. R. R.,* 67 N. C., 278; *Lecombe v. R. R., supra; Searl v. School Dist.,* 133 U. S., 553; *Cherokee Nation v. R. R.,* 135 U. S., 641. If the facts of this case are examined in the light of the foregoing principles, it cannot be doubted that the Legislature has assumed to exercise its unquestionable right to have land condemned in the town of Greenville for public streets. The Legislature has conferred upon the town commissioners general authority to act in the premises where lands are required for the purpose of opening and laying out streets or for other public purposes, and has also provided a perfectly fair and sufficient method for ascertaining and paying just compensation to the landowners whose property may be taken for the purpose. *S. v. Jones,* 139 N. C., 613. The present charter of the town, which was enacted long prior to the condemnation of the land, alleged to be unlawful, expressly provides that the town authorities may at once enter upon the land and proceed with the proposed improvements, and that the filing of the petition for the purpose of having the compensation of the landowner ascertained shall not have the effect of stopping or delaying the work; so that the reasons for the dissent from the opinion and judgment in *S. v. Jones,* by *Justice Connor,* do not apply to this case, it being wholly based upon a construction of the charter of Creedmoor, which had no provision such as we find in the charter of Greenville. Private Laws 1899, ch. 115, as amended by Private Laws 1909, ch. 18. The commissioners, as appears in the case, have proceeded in accordance with the power and authority vested in them by the Legislature, and we do not see how the regularity or validity of their action can well be challenged upon any recognized principle of law. But the plaintiff, in his fourth contention, says that the defendant cannot lay an axe to a single one of the trees on the sidewalk in front of his lot, which shelter his home—not even touch a single bough—until there has been an appraisement of his damage in the manner prescribed by its charter. We do not understand the plaintiff to assert that the damages must be paid before any work of widening and improving the streets is entered upon, and this being so, what advantage does he derive by an appraisement without payment? But this Court has decisively answered this contention against the plaintiff. In *McIntire v. R. R.,* 67 N. C., 278, it is said: "If the owner of land overflowed by a milldam could bring his action on the case for damages every day, no public mill could be established. In like manner, if the owner of land taken by a railroad for its track could bring his action of trespass every day, no railroad could be built. . . . If the officers of the company cannot enter on lands and make surveys without a trespass, they could never locate the road. And if the road were located, and its construction delayed until the damages to all the landowners on the route were ascertained under the act, the delay would be indefinite and no benefit to any one. To hold that during the pendency of a proceeding by the company to have the lands condemned, it could not prosecute its work without being exposed daily to an action of trespass, would effectually defeat the policy of the act." To the same effect is *Johnston v. Rankin,* 70 N. C., 550: "There is, therefore, nothing to forbid the defendants from proceeding with the improvement pending the appeal. The law of this State does not require compensation to be *first* made, as that of some other States does." In that case the charter of Asheville did not expressly authorize an entry upon the land before an assessment of damages. See,

also, *R. R. v. Davis,* 19 N. C., 451; *Phifer v. R. R.,* 72 N. C., 433; *R. R. v. McCaskill,* 94 N. C., 746; *S. v. Jones, supra; S. v. Lyle,* 100 N. C., 497; *R. R. v. R. R.,* 116 N. C., 924.

Lewis in his treatise on Eminent Domain, sec. 456, says that in most States, and by the greater weight of authority, it is held that the making of compensation need not precede an entry upon property, provided some definite provision is made whereby the owner will certainly obtain compensation for the loss of his property, using that word in its most extensive sense, as indicating injury to any of his property rights. He classifies the courts thus holding, and assigns this Court to a place with the large majority. The dissenting courts were influenced in their decisions either by some peculiar local law or held that the owner of property required for public use should not be compelled to part with it without some adequate assurance that he will receive compensation, and should not be made to take any risk of compensation; but in this respect our decisions fully protect him by allowing the courts to require security for the ultimate payment of damages, to be given in proper cases before the entry upon the land. *Phifer v. R. R., supra; R. R. v. R. R., supra; Cherokee Nation v. R. R.,* 135 U. S., 641. What was said in *Sweet v. Rechel,* 159 U. S., 380, is very pertinent to this discussion: "When, however, the Legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner. . . . It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process. . . . The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision before his occupancy is disturbed." Those decisions are, of course, predicated on the absence of any special requirement of the local law that an appraisement and payment of the damages shall be made before the actual taking and entry upon the property. They will, therefore, be modified in their application to any given case by local provisions in respect to the matter.

3. The plaintiff further contends that the public interest does not demand that the street be widened and the trees destroyed, as ordered by the board. Eminent domain is the right or power of a sovereign State to appropriate private property to particular uses, for the purpose of promoting the public welfare. 1 Lewis Em. Dom., sec. 1. Being an essential attribute of sovereignty, it is exercised by the people through the Legislature, to which it has been delegated. The time and manner of its exercise must, from its very nature, be left to the discretion and wisdom of that body. When conferred upon some subordinate municipal body, the same discretion necessarily resides in it. Referring to the questions which may arise in the procedure for the condemnation of private property for public use, we find in Lewis on Eminent Domain, sec. 366, the following rule: "All questions relating to the exercise of the eminent domain power, which are political in their nature and rest in the exclusive control and discretion of the Legislature, may be determined without notice to the owner of the property to be affected. Whether the particular work or improvement shall be made, or the particular property taken, are questions of this character, and the owner is not entitled to a hearing thereon as a matter of right. 'The commissioners, in determining this preliminary question of the necessity of appropriating lands for the purposes of a ditch, are called to the exercise of political and not judicial powers. It is a question

rather of public policy than of private right. It is not upon the question of the appropriation of lands for public use, but upon that of compensation for lands so appropriated, that the owner is entitled, of right, to a hearing in court, and the verdict of a jury.'" *Zimmerman v. Canfield,* 42 Ohio St., 463; *S. v. Jones, supra.* What is a public use is a question for the decision of the judiciary, and whether any particular use is a public one must be decided in the same way. When property is condemned for a public street, it is a taking for a public use, as a matter of law, and this being determined, the question as to the necessity or expediency of devoting the property to the public use is one which must be left to the legislative department. *Call v. Town of Wilkesboro,* 115 N. C., 341; *Stratford v. Greensboro,* 124 N. C., 127; *Cozard v. Hardwood Co.,* 139 N. C., 283. This subject was fully considered in *Hull v. Roxboro,* 142 N. C., 453, in which we said: "The general rule in reference to the particular question herein involved, therefore, is that where injuries are incidentally committed by the officers or agents of a public corporation, in the exercise of those discretionary or legislative powers which are delegated to them by the Legislature, or when, by reason of any failure to exercise them, the same result follows, the municipality is wholly free from liability. 1 Beach Pub. Corp., secs. 258, 773, 752." This rule was supported by the citation of numerous authorities, and among others, this extract from Cooley Const. Lim. (7 Ed.), 300: "As no State can or does undertake to protect its people against incidental injuries resulting from its adopting or failing to adopt any proposed legislative action, so no similar injury resulting from municipal legislative action or nonaction can be made the basis of a legal claim against a municipal corporation. If, therefore, a city temporarily suspends useful legislation; or in any other manner, through the exercise or failure to exercise its political authority, causes incidental injury to individuals, an action will not lie for such injury. The reason is obvious. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints." See 1 Smith Mod. Law of Mun. Corp., secs. 269, 270, and 271. The very question we now have under consideration was presented in *Tate v. Greensboro,* 114 N. C., 392, and the authority of the city to remove trees for the purpose of opening or improving a street was emphatically affirmed in a learned opinion by *Justice Burwell,* and in *Rosenthal v. Goldsboro,* 149 N. C., 128 (reported with an elaborate note in 16 Am. and Eng. Anno. Cases, 639), *Justice Hoke* reviews that case and deduces therefrom certain rules by which may be tested the right to revise the action of the local municipal board in regard to the opening and improvement of streets within a city, which, if applied to the facts of this case, prevent us, as they do the lower court, from entering upon any such revision. In the *Tate case,* it is said that, "The law gives to all such corporations an almost absolute discretion in the maintenance of their streets, considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid." Reference is then made to the provision of the statute that the boards of commissioners of towns shall provide for keeping in proper condition the streets and bridges in the same, in the manner and to the extent they may deem best. Revisal, sec. 2930. It was concluded that under the general law and the charter of Greensboro, which confers no larger powers than those found in the charter of Greenville, that city was clothed with a broad discretion in the control and betterment of its streets, and if damages had come to the plaintiff by reason of acts done by it for that purpose, neither negligently nor fraudulently, maliciously nor wantonly, but in good faith and in the careful exercise of that discretion, it is *damnum absque injuria,* citing *Chase v. City of Oshkosh,* 81 Wis., 313; *Smith v. Washington,* 20 How., 136; *Brush v. Carbondale,* 78 Ill., 74; *Pontial v. Carter,* 32 Mich., 164. While this question is a very important one, we scarcely need to prolong the discussion of it, as a full and exhaustive examination of the leading authorities will be found in the note to *Rosenthal v. Greensboro,* 16 Am. and Eng. Anno. Cases, at page 642, and we think the views stated by us are well supported by them and the other cases we have cited, to which we add *Durham v. Rigsbee,* 141 N. C., 128, where it was held: "The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither these defendants nor the courts can interfere. It is a political and administrative measure as to which the defendants are not even entitled to notice or to be heard. The method of taking land for a public use is within the exclusive control of the Legislature, limited by organic law, and the courts cannot help the injured landowner, where the statute has been strictly followed, until the question of compensation is reached."

The liability of a municipal corporation for negligence in the construction of public works and in making improvements in its streets is fully considered in several cases decided by this Court. *Jones v. Henderson,* 147 N. C., 120, in which the cases are collected. The charter of the defendant expressly confers full authority to widen Fifth Street and to remove any and all obstructions therefrom, whether of a temporary or permanent character, and also makes adequate provision in every way for compensation to the owner of property taken for the purpose of laying out or widening streets.

The judge found as a fact that there had been no abuse of the defendant's discretion in ordering this street to be widened and no oppression on its part of the plaintiff, and we are not disposed, upon the proof now before us, to change this finding. But while we so rule, and our decision must be against the plaintiff, there are some facts and circumstances which should make the defendants pause and consider, and to decide after greater reflection, whether they are being really just to the plaintiff in the manner of exercising their discretion, and whether, without impairing in the least the public interest, which must be first considered, there is not some way by which that interest can be fully subserved, and the trees, which afford shade and comfort to the plaintiff's home, left standing. If, in the fair and honest exercise of their judgment, no plan can be thus devised, the trees must be sacrificed for the public good, for it is one of the first maxims of government and the law that private convenience must yield to that of the public (*privatum commodum publico cedit*), and such a private loss must seek, and can only find, its just compensation in the corresponding public benefit (*privatum incommodum publico bono pensatur*). It appears by the evidence and the map filed in the case, that if the present plan of improvement is not altered the trees will obstruct the roadway, as that part of the sidewalk where they now stand will become a part of the street between the curbs. We would hesitate to interfere with the exercise of the sound judgment of those who have the matter in their charge, except in an extreme case indicating bad faith, malice, or wantonness, for they are trustees of the public, and as such, vested with a very large discretion, as we have shown; but they should discharge their duty to the public with as little injury to the citizen as is possible under the circumstances.

We must not be understood as intending to interfere with the free exercise of the discretionary power conferred upon the commissioners of the town, but as merely suggesting that while their discretion should be exercised primarily in favor of the public welfare, their duty is not so limited in its sphere that the citizen is not entitled to some consideration. We cannot control the exercise of their judgment upon matters of a legislative or administrative character, unless, as we have said, they act fraudulently, maliciously, or wantonly, and, instead of trying to promote the public good in the execution of the trust and confidence reposed in them, they seek to injure and oppress the citizen and deprive him of his property under the form of law.

Section 23, chapter 85, Laws 1885, placing restrictions upon the right of condemnation for street purposes in Greenville, has no bearing on the case, as the Legislature does not, in such a way, surrender its power of eminent domain. Nichols on Em. Dom., sec. 315. That act has been repealed by the subsequent charter of the town and the amendment thereto, at least in so far as they conflict with it, and the repeal was within the legitimate exercise of legislative authority. Elliott on Roads and Streets (2 Ed.), sec. 186 and note 2.

We must declare that there is no error in the judgment.

Affirmed.

S. M. P. TART ET AL. v. WINSLOW TART ET AL.

(Filed 5 April, 1911.)

1. **Advancements—Definition.**

   An advancement is a free and irrevocable gift by a parent, in his lifetime, to his child, or to a person standing in place of such child, on account of such child or person's share in the donor's estate, which he will receive under the statute of descent or distribution if the parent or donor die intestate.

2. **Advancements—Interest—Accounting.**

   No interest on an advancement made by a deceased parent to his child shall be charged against the child until an accounting, when same is had within the two years' time allowed by law to settle the estate of the intestate, whether the advancement had been made in lands, investments, or money.

3. **Same—Rents and Profits—User.**

   Where in 1885 a father put one of his sons in possession of a tract of land, and the latter remained in possession, enjoying the rents and profits until 1906, when the father conveyed the land by way of advancement to the son and his seven children, it was *Held*, (1) that the rents and profits of the land until conveyance made were under ordinary conditions properly chargeable as advancements; (2) that owing to the difficulty of determining the amount of such rents and profits by reason of improvements put upon the land by the son and claimed as permanent, the proper basis of accounting in the present case is held to be the interest on the value of the land from the time the son became possessed of it, and as it then was, until the conveyance in 1906; (3) that the son's interest in the land at the time of the conveyance made in 1906 is also chargeable as an advancement and without interest.

4. **Same.**

When an advancement of lands has been made by the intestate to his child, no rents or profits are chargeable to the child until an accounting, if had within the time allowed by law for the settlement of estates.

5. **Executors and Administrators—Personalty—Deceased Widow—Distributive Share—To Whom Payable.**

The intestate died, leaving children by a former marriage and a widow, who subsequently died intestate. An administrator of her estate qualified, and was made a party in an action between the husband's heirs at law for division of his property, in which his administrator was also a party: *Held*, in this case the share of the deceased widow in her husband's personal property should be paid to her administrator.

6. **Advancements—User—Damages—Declarations—Evidence.**

Declarations of the intestate as to the value of lands conveyed his sons as advancements made after the date of the deeds: *Held*, in this case, incompetent, and not sufficient to charge one of the sons, who had theretofore for some years had the use of the lands, with the value of timber he had then cut therefrom.

7. **Appeal and Error—Reference—Remand—Rereference—Procedure.**

Upon appeal in this case the Court so decidedly departed from the basis of accounting adopted by the referee that it is directed that it be remanded to him with directions to restate the account and revise his findings of fact, hearing further testimony if he considers it desirable to do so.

APPEAL from *Whedbee, J.*, at October Term, 1910, of SAMPSON.

Proceedings heard on exceptions to report of referee. These proceedings were originally instituted before the clerk of the Superior Court by some of the children and grandchildren, heirs at law and distributees of Whitfield Tart, Sr., deceased, against others of the children of said Whitfield Tart, to bring about a division of certain lands of the deceased by sale of same. In the complaint and answer allegations were made of advancements to the different children in lands and money. Meanwhile the land was sold by order of court and the proceeds held, subject to an accounting, and orders made in the cause. The administrator of the estate is also a party, and it appears that he had on hand, for distribution, personal estate to the amount of several thousand dollars. The heirs at law and distributees, parties plaintiff and defendant, are children by a former wife. The last wife and widow having died intestate since her husband, her administrator has been duly qualified and made a party of record. On issues found, the cause was transferred to the civil-issue docket and, at August Term, 1910, the entire matter was referred by consent. Hearing was had and report was made to October Term, 1910, when and where same was heard on exceptions as stated. It appeared from the report, among other things, that Whitfield Tart, Sr., had died intestate on 5 April, 1908, leaving him surviving his widow, since deceased, and the plaintiffs and defendants, his children by a former wife, and the children of some who had died, and owning the land, which had been sold by order of court in this cause, and several thousand dollars of personal property. That said Whitfield Tart had, many years back—twenty and upward—made advancements to some of his sons defendant by conveying to them tracts of land which they had owned and occupied since; had made also some advancements in money to his said sons and others of his children. That on 11 October, 1906, Whitfield Tart, Sr., had conveyed to his son, Whitfield Tart, Jr., and to his children, five then born and one *in ventre sa mère,* the home tract of land, reserving a life estate for himself and wife for the portion on the east side of the road, where they lived, and that the interest in this land to said Whitfield, Jr., was an advancement to him by his father. It further appeared that Whitfield, Sr., in 1885, had put said Whitfield, Jr., in control and possession of 75 acres of this tract, the portion lying on west side of the road, and that said son had enjoyed and possessed that portion for his own use and benefit down to the time of making of the deed referred to. The referee stated the account by charging the children with the real estate and money valuation of the advancements and interest thereon from time same were received to the death of the intestate, except in the accounting with Whitfield, Jr. This last was charged with one-seventh value of the interest on the home place, conveyed to him by the deed of 1906, and interest thereon to the death of intestate. He was also charged with the interest, in lieu of rent, on the unimproved value of the 75 acres, occupied and possessed by Whitfield from 1885 to the date of the deed. Exceptions were filed to different items of charge by plaintiffs and defendants. The court overruled the exceptions by defendant, sustained some and overruled others of the exceptions of plaintiff, and entered judgment in accordance with his rulings on the report and exceptions thereto. Both plaintiff and defendant, having duly excepted, appealed to this Court.

Faison & Wright and Fowler & Crumpler for plaintiff.

F. R. Cooper, John D. Kerr, and George E. Butler for defendant.

DEFENDANT'S APPEAL.

HOKE, J., after stating the case: An advancement has been properly defined as a "free and irrevocable gift by a parent, in his lifetime, to his child, or person standing in place of such child, on account of such child or person's share in the donor's estate, which he will receive under the statute of descent or distribution if the parent or donor die intestate." Thornton on Gifts and Advancements, p. 510. And in note 2 of this publication (p. 510) is cited a definition from 25 Ga., 352, as follows: "An advancement is that which is given by a father to his child, a presumptive heir, by anticipation of what he might inherit." When an adjustment of claims involves a question of advancements, the general rule is, they are to be valued at the time the estate or interest passes (*Ward v. Riddick,* 57 N. C., 22; *Shiver v. Brock,* 55 N. C., 137; *Moore v. Barrow,* 89 Tenn., 101), and in case of a pure advancement, it is very generally held that on an accounting no interest shall be charged before the death of the intestate. *Roberson v. Nail,* 85 Tenn., 124; *Ex Parte Glenn,* 20 S. C., 64; *Osgood's case,* 17 Mass., 356, and in this State it would seem, by authority, that no interest should be charged prior to the time of accounting, provided the same is had within the two years allowed by the law for the settlement of the estate. *Scroggs v. Stevenson,* 100 N. C., 354-360; *Hanner v. Winburn,* 42 N. C., 142. The principle that no interest is ordinarily chargeable on advancements obtains whether the same have been made in lands or investments or money, and has been applied in cases where the transaction is evidenced by the claimant's notes (*Roberson v. Nail, supra; Patterson's Appeal,* 128 Pa. St., 269; *Krebs v. Krebs,* 35 Ala., 293; *Green v. Howell,* 62 Pa., 203; Thornton, 609), and the same principle upholds the ruling that where lands have been conveyed by way of advancement, rents may not be properly charged against the owner. *Kyle v. Cunaud,* 25 W. Va., 760. There was error, therefore, in charging interest against the claimants on the money advanced by the intestate to the different parties or on the price of the lands, valued at the time the same were conveyed to the owners, and the account must be reformed to accord with this decision.

The case of Whitfield Tart, Jr., is presented on facts differing, in some respects, from the others. The land was conveyed to him and his children and the advancement thereby perfected on 11 October, 1906. Under our decisions the effect of this deed was to convey to Whitfield Tart, Jr., one undivided seventh of the land, as tenant in common with his children. *Lewis v. Stancil, ante,* 326; *King v. Stokes,* 125 N. C., 514; *Silliman v. Whitaker,* 119 N. C., 89. The referee has, therefore, properly charged against Whitfield Tart, Jr., the one-seventh of the value of the land at the time of the conveyance; but for the reasons heretofore stated, the interest on said value to the death of the testator should be eliminated. The report further charges Whitfield Tart, Jr., with the interest on 75 acres of land lying west of the road, which, the evidence shows, said Whitfield Tart, Jr., has controlled, used, and enjoyed since 1885 to the date when this and the remainder of the tract was conveyed to him and his children. This is not a case where rents are not chargeable against the owner of a tract of land, perfected by conveyance by way of advancement, but this was a gift properly chargeable as an advancement for the user of the land by one who was not the owner. A similar case was presented and passed upon in *Hanner v. Winburn, supra,* where a slave was placed, by a father, in possession of his son and died before the father had recovered possession. The father then died intestate, and it was held that the slave was not an advancement, but the hire of the slave was, and same was so charged. Ordinarily, the value of the use and occupation of the land as it was when Whitfield, Jr., took possession, would be the correct amount of the charge, but inasmuch as the son has made improvements on the land and it is difficult, if not impossible, to determine how much should be allowed for as permanent, we conclude that on the particular facts of this case the safer rule for estimating this charge will be to follow the course adopted in the report and on this item charge Whitfield Tart with the annual interest on the value of the land as it was when he took possession in 1885. This feature of the report, therefore, will not be disturbed. And on these facts we are of opinion, too, that no allowance should be made to Whitfield Tart, Jr., for improvements. He is only charged with interest on the value of the 75 acres in its unimproved state, and under the conveyance he and his children reap the benefits of such permanent improvements as he has made.

There are no special facts or circumstances which require that the valuation of this home place at the time of the conveyance should be disturbed or modified. The remaining portions of the judgment of the court, sustaining plaintiff's exceptions No. 3 and No. 6 and Nos. 12 and 13 and all other portions of the judgment as it affects the defendants, are affirmed, except that, for the reasons stated, no interest will be allowed on these advancements. On defendant's appeal the report should be modified to accord with the principles and rulings made in this opinion, and it is so ordered.

Modified.

PLAINTIFF'S APPEAL.

Plaintiffs, other than the administrator of Nancy Tart, the deceased widow of Whitfield Tart, Sr., except to the judgment of the court which directs that the share of the deceased widow in the personal property of the intestate shall be paid to her administrator. This ruling is undoubtedly correct and should be affirmed. *Neill v. Wilson,* 146 N. C., 242, 245, citing with approval *Whit v. Ray,* 26 N. C., 14; *Rose v. Clark,* 8 Paige, 547; 14 Cyc., 107, 109. Plaintiffs further except for that the grantees of the real estate are not charged with rents. For the reasons given in the opinion in defendant's appeal, the owners of land conveyed by way of advancement are not chargeable with rents nor with interest on the value of the land. This rule was held not applicable to the charge against Whitfield Tart, Jr., for the user and occupation of the 75 acres of land possessed and enjoyed by him from 1885 to the date of the conveyance to him and his children. The value of this user was held a correct charge by way of advancement, but owing to the great difficulty of making an equitable adjustment, the Court decided that interest on the value of this land as it was when he first took possession of it was the safer basis of estimate. We do not think there is sufficient evidence to charge Whitfield Tart, Jr., with the value of the timber cut by him on his father's land, and we are of opinion that the declarations of Whitfield Tart, Sr., as to the value of the several tracts of land conveyed to his sons and after the date of such conveyances are inadmissible on the question of value. Inasmuch as our rulings involve such a pronounced departure from the basis of accounting adopted by the referee, we deem it desirable that our decision be certified, to the end that the cause be remanded to the referee with directions to restate the account in accordance with the judgment of the court below as modified by these opinions; revising his findings of fact and hearing further testimony if he considers it desirable to do so. The costs of the appeals will be divided between the parties plaintiff and defendant.

Modified.

CHARLES A. RILEY COMPANY v. W. T. SEARS & CO., INC., ET AL.

(Filed 5 April, 1911.)

1. **Usury—Pleadings—Answer—Parties—Legal Representatives.**

It is usury when unlawful interest has been knowingly taken, reserved, or stipulated for on a loan of money, directly or indirectly; and one knowingly acting in violation of our usury law by taking, receiving, reserving, or charging a greater rate of interest than 6 per cent per annum, either before or after the interest may accrue, "shall forfeit the entire interest, and when a greater rate has been paid, double the amount may be recovered by the party paying the same, or his legal representatives," and such may be recovered by way of counterclaim set up in the answer. Revisal, sec. 1951.

2. **Usury—Contracts—Notes—Illegal Consideration.**

When a debtor has paid his creditor the amount of a loan lawfully chargeable against him, and in addition thereto has given his notes for the balance of his obligation arising from an usurious amount of interest, agreed upon in making the loan, the creditor cannot recover on the notes in a suit brought for their collection.

3. **Same.**

When it appears by a written contract entered into between the parties that the debtor had borrowed an amount of money which he had obligated himself to repay at a certain rate per thousand feet of lumber to be cut from timber to be purchased by the money loaned, the payments not to be less than a certain monthly sum of money, which plan included the payment of an additional amount of money to that borrowed and the lawful rate of interest thereon; and it further appears that the debtor had repaid the amount actually borrowed, with more than the lawful interest, and had given his notes for the balance: *Held*, the notes being given for an additional amount to that of the money actually loaned, and legal interest, are based entirely on an usurious consideration, and no recovery thereon can be had.

4. **Usury—Contracts—Partnership—Test.**

When money is loaned to purchase standing timber and to be repaid at a certain rate per thousand feet when the timber is sawed, not less than a fixed sum per month, there is no partnership arrangement between the borrower and the lender, so as to take the matter from the operation or purview of the law against usury.

5. Same.

The obligation to repay a loan of money borrowed to undertake an enterprise which is not made dependent on the risks to be incurred or upon whether the venture or enterprise succeeds or fails, with a stipulation in the contract for its repayment in any event at a rate of interest exceeding that allowed by law, is usurious, and not a partnership contract.

6. Same—Substitution—Accounting.

A partnership, T. & Co., having borrowed money to be invested in standing timber, to be repaid at a certain rate per thousand feet of lumber cut therefrom, under an agreement held to be usurious, dissolved by the retirement of T., and S., the company of the firm, formed a partnership with a third person under the name of S. & Co., which soon thereafter became incorporated. Some ninety days before the time provided for the beginning of the various payments upon the loan agreed upon under the contract of T. & Co., the corporation, with the creditor's consent, cut lumber and paid off the debt, except that created by the usurious part of the contract. The corporation and the creditor, by a written agreement, entered into an accounting together and determined upon the amount due the latter under the contract: *Held*, by the consent of all the parties the corporation was substituted as successor to the original parties and the usury affecting the original transaction was not effaced or removed; (2) the agreement under which the accounting was had was with reference to and in acknowledgment of the original contract.

7. Usury—Contracts—Fraudulent Intent—Proof.

When the lender of money intentionally charges the borrower a greater rate of interest than the law allows, and his purpose stands clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown.

8. Usury—Contracts—Estates—Loss—Parties—Privies—Receivers.

The plea of usury is open to the parties and their privies, and may be made when by the transaction the debtor's estate is wrongfully depleted, and ordinarily by one having the legal right to protect the estate, as, in this case, a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Revisal, sec. 1222.

9. Usury—Contracts—Forfeiture—Penalty—Pleadings—Amendments.

In an action brought to recover money alleged to be due on a contract entered into between the parties, wherein the plea of usury is set up in the answer and a recovery is sought under our statute of double the amount of the interest paid, the recovery sought is in the nature of a penalty; and when the facts are known or readily obtainable the law requires a definite statement in the pleading as to the time and amount, before allegations in such action are held to be sufficient, and such statement not having been made, on the facts in this case, no amendment to the pleadings should be allowed.

APPEAL from *Whedbee, J.*, at October Term, 1910, of NEW HANOVER.

Civil action, heard on exceptions to report of referee. The action was instituted by plaintiff against defendant corporation in behalf of himself and all other creditors, on the ground of insolvency, alleging that plaintiff's debt was about $27,000 and a valid lien upon a portion of the assets of defendant company. A receiver was duly appointed, and the bulk of defendant's assets or a large amount of same have been collected by said receiver and are held subject to the orders of the court made in the cause.

Pending the suit, John A. Arringdale intervened and, by petition, alleged that he was a creditor of defendant corporation to the amount of $6,242.33, with some interest, being a balance due and owing on a claim of defendant to the original amount of $7,442.33 and on which some payments had been made, and that such claim, to the extent of $6,000, evidenced by notes, was a valid lien on a portion of the assets, sufficient to pay the same, and $242.33 was evidenced by open account and entitled to share pro rata in the distribution of the assets.

This claim was resisted by plaintiff, Riley Company, and on the grounds (1) that it was for usurious interest, and void; (2) that in fact and in truth the claimant, John A. Arringdale, was a partner of defendant corporation and, as such, liable for the debts; (3) that, in any event, the lien alleged in favor of the petitioner had been displaced by reason of a subsequent agreement and transaction between the claimant and defendant company, providing for a substituted and later lien. That this last had not been registered, and that plaintiff's lien had thereby become a prior claim on the assets.

The receiver also answered, resisting the claim of the petitioner, Arringdale, on the grounds (1) that same was usurious and void; (2) that, if not, the claimant was a partner, etc.

The cause was referred to E. S. Martin, Esq., who, after hearing the testimony and arguments of counsel, made a report, in which it was held, among other things, that the claim of the petitioner, Arringdale, was a valid claim and a prior lien on a portion of the assets to the amount of $6,000, to wit, the notes, with some interest, and that the open account was a debt to be paid pro rata with other unsecured and general creditors of the corporation. Plaintiff and the receiver filed various exceptions to the report and, on the hearing, certain additional findings of facts having been agreed upon by the parties, the court overruled the exceptions and gave judgment in favor of the petitioner, according to the report of the referee. The plaintiff and the receiver, having duly excepted, appealed to this Court.

Herbert McClammy for Riley.
Davis & Davis for appellant Bellamy.
Iredell Meares and Rountree & Carr for Arringdale.

HOKE, J., after stating the case: It appears, from the very full and careful report of the referee, that on 4 February, 1904, the claimant, John A. Arringdale, a party of the first part, entered into an agreement with S. P. Taylor & Co., a firm composed of S. M. Lloyd, S. P. Taylor, and W. T. Sears, as party of the second part, by which Arringdale loaned the said firm the sum of $12,000 to be used by them in the purchase of certain timber lands in the county of Columbus, N. C., to wit, 4,000 acres, known as the Flippo lands, and other timber and timbered land in that section, the amount purchased to be not less than 20,000,000 feet, and the said Arringdale was to have a lien on the lands and timber purchased and other property, mill, machinery, appliances, etc., engaged in the work, to secure the said $12,000 and the other sums agreed to be paid and obligations assumed under the contract by the parties of the second part. That the parties of the second part, pursuant to the agreement, soon after bought the Flippo lands, estimated to contain between 15,000,000 and 16,000,000 feet of timber, but did not buy any other standing timber in said neighborhood, though it or its successors "may have bought other logs."

In reference to the repayment of this loan, the contract, clearly contemplating that all the timber and logs described in the contract shall be cut and shipped either as logs or after they have been sawed into lumber, contains the provision that the parties of the second part shall repay the $12,000 "without interest," and, in addition, shall pay to the party of the first part as much as 50 cents per thousand feet on all logs or lumber shipped, to an amount not less than 20,000,000 feet, and as to the time when these payments shall be made, makes stipulation as follows:

"(4) Parties of the second part covenant and agree after the expiration of 90 days from the execution of this agreement to commence to repay and to pay to the party of the first part the sum of $12,000 advanced to them as aforesaid, at the rate of $2 per thousand feet for all the lumber cut and logs shipped, which payments shall not amount to less than $500 per month, payable on the 10th day of each month. The same is to be credited by the party of the first part to the parties of the second part each month as paid.

"(5) The parties of the second part further covenant and agree that after they have repaid to the party of the first part the sum of $12,000 cash advanced as aforesaid, which $12,000 is not to bear interest, they are to pay to the party of the first part 50 cents per thousand for all logs shipped by them from the mill, and also 50 cents per thousand feet on every thousand feet of lumber and all kinds cut at their mill. These payments are to be made on all logs shipped or lumber cut from the time of the execution of this agreement, but these payments are not to begin to be made until after the original $12,000 has been repaid as aforesaid. And after that has been repaid the parties of the second part are to make these payments in the same manner as they were to repay the original $12,000, to wit, they are to pay $2 per thousand and no less than $500 per month on all logs cut, until they have paid to the party of the first part a sum equal to 50 cents per thousand feet on all logs shipped and 50 cents per thousand feet on all lumber cut from the beginning of this contract, after which time parties of the second part are to pay to the party of the first part monthly a sum equal to 50 cents per thousand feet upon each thousand feet of lumber cut during the last month. And it is hereby declared to be of the essence of this contract and the consideration for the loan of the $12,000, that parties of the second part are to purchase all of the timber possible in the section of the country hereinbefore named, and to pay to the party of the first part the 50 cents per thousand feet on all logs shipped and 50 cents per thousand feet on all lumber sawed as aforesaid: *Provided*, that the parties of the second part are not to pay anything for the lumber cut and used by them in structures to be used for the conduct of the business herein referred to."

And further:

"(7) Parties of the second part further covenant and agree to and with the party of the first part that if they fail to make any payment, or part payment, as hereinbefore stipulated to be made, or if they fail to perform any of the other agreements herein made at the time and in the manner stipulated, then all of said payments shall become immediately due and payable at the option of the party of the first part, including any and all damages which said party of the first part may suffer by reason of the breach of this contract, or any provision thereof; and the party of the first part is hereby authorized to forthwith take possession of all the property of the parties of the second part upon which a lien has been given, or is intended by this contract to be given, and to sell the same by public auction after due advertisement according to law, for the purpose of paying said debts and damages aforesaid."

That shortly after the execution of this contract, S. P. Taylor retired from the firm of S. P. Taylor & Co., receiving the cost price of his interest, and the assets of the firm were taken over by W. T. Sears and S. M. Lloyd, under the firm name of W. T. Sears & Co., and very soon thereafter this firm, with other associates, organized the defendant corporation, under the name and style of W. T. Sears & Co., Incorporated, the firm assets all passing to the defendant corporation. That these changes all took place within the 90 days provided for in the contract for the beginning of the payments, and that any and all payments to John A. Arringdale for or on account of the contract were made to him by defendant company, incorporated.

From the additional facts agreed upon by counsel and embodied in the judgment of the court, it appeared that under and by virtue of the contract and down to and including 26 July, 1906, the defendant corporation had paid to John A. Arringdale the amount of the loan, $12,000, and in addition thereto $2,627.20=$14,627.20. It was further made to appear, that on 28 May, 1907, John A. Arringdale making claim for further amounts due under the contract, said Arringdale and defendant corporation had an accounting together and fixed upon the balance due at $7,442.33, and thereupon signed the following agreement:

"Whereas, on 4 February, 1904, S. P. Taylor & Co. executed a certain agreement or mortgage to the said party of the second part, whereby they were to pay to the said party of the second part certain amounts of money per thousand feet of lumber to be cut at Wananish, N. C., and secured by a lien upon certain property described in said agreement; and whereas W. T. Sears & Co., a partnership, succeeded to the rights and obligations of the said S. P. Taylor & Co., and W. T. Sears & Co., Inc., have succeeded to all the rights and obligations of said partnership and have assumed this indebtedness, which indebtedness has been fixed by agreement at $7,442.33 as the full amount at this time due under the said agreement:

"Now, therefore, for and in consideration of the premises and the further consideration of $1 in hand paid, the said party of the first part agrees to execute to the party of the second part certain notes of even date herewith in lieu of the said indebtedness, and it is further agreed that the said contract or mortgage above referred to, of date 4 February, 1904, shall remain in full force and effect until all the notes executed under this agreement are paid in full, and that the same shall be secured by the said agreement or mortgage in as full and ample manner as the original debt was secured. And it is further agreed that on failure of the parties of the first part to pay any or all of the notes executed under this agreement, then the party of the second part may proceed to foreclose the lien contained in the agreement of 4 February, 1904, at any time after default in the payment thereof. And it is agreed by the party of the second part that when all the notes provided for under the terms of this contract are paid in full he will cancel said contract and release all liens claimed thereunder." Same being duly signed by "W. T. Sears & Co., Inc., John A. Arringdale."

That of this amount $1,200 was paid in money in May, 1907; $243 was in the form of an open account and the remainder of the claim was evidenced by a number of notes aggregating $6,000 and being the notes referred to in the above agreement and the same sued on or demanded in the present petition.

Upon these facts and findings, we are of opinion that the contract between these parties by which the money was obtained was usurious, and that no further collection may be had thereon. In reference to the case presented, usury may be said to exist where unlawful interest has been knowingly taken, reserved, or stipulated for on a loan of money. In its modern acceptation and in more comprehensive terms, it has been very well defined in the Georgia Code as follows: "Usury is the reserving or taking or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." And our statute on the subject declares, "That this taking, receiving, reserving, or charging a greater rate of interest than 6 per cent per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest . . ." and in effect that where a greater rate has been paid, double the amount may be recovered by the party paying the same or his legal representative, or such amount may be set up by way of counterclaim, etc. Revisal 1905, sec. 1951. The courts of this country have been very generally insistent and alert in the enforcement of these regulations concerning usury, and our own

Court, in many well-considered decisions construing our statute, has established the principle expressly stated in the Code of Georgia, "That whenever, 'directly or by indirection,' unlawful interest has been knowingly taken or charged, the provisions of the statute must be applied." *Tayloe v. Parker,* 137 N. C., 418; *Carter v. Ins. Co.,* 122 N. C., 338; *Miller v. Ins. Co.,* 118 N. C., 612; *Gore v. Lewis,* 109 N. C., 539; *Arrington & Beavans v. Jenkins & Goodrich,* 95 N. C., 462. And decisions without number from other courts could be cited in approval of the principle. *Morgan v. Shernmerhorn,* 1 Paige, 544; *Weaver v. Burrett,* 110 Iowa, 567; *Mattheson v. Shinburg,* 94 Wisconsin.

In the contract we are considering, the $12,000 was originally furnished as a loan of money. It is so nominated in the bond, and more than once, and the referee properly so finds. In our view and by correct interpretation the charge stipulated for its use was 50 cents per thousand feet on an amount not less than 20,000,000 feet timber, whether shipped as logs or lumber, and provision is made for repayment of the principal with the stipulated charges within a comparatively short time, and by and under any possible interpretation within a reasonable time from the date of the contract. In its practical operation and as a matter of fact the lender in very little over two years from the time the repayment was to begin, received back his $12,000 and in addition $2,627.20; so that, if this was a loan, as the parties termed it, he had already received for this money when these notes now sued on were given the principal sum and nearly twice the amount of interest allowed by law. These notes, therefore, being given for an additional amount claimed, are based entirely on a usurious consideration, and no recovery thereon can be had. *Faison v. Grandy,* 126 N. C., 827; *Ward v. Sugg,* 113 N. C., 489. It is earnestly insisted for the petitioner that this is not a charge for money lent in the ordinary acceptation of things, but only a profit-sharing agreement, and as such not within the purview of the usury statute, and we are cited to 1 Paige on Contracts, 755; *Ovis v. Curtis,* 157 N. Y., 657; *Cript v. Barrow,* 108 N. Y., 187; *Scupps v. Crawford,* 123 Mich., 173, and other cases in support of the position. As stated in Paige and as instanced in some of the cases cited, there are decisions to the effect that in a general contract of partnership an agreement that one of the partners who advances money as capital shall receive from the proceeds of the business an annual return in excess of the legal rate of interest is not necessarily usurious. It has been held, too, that a loan of money for some business enterprise with a provision for sharing profits as a substitute for interest and in excess of the lawful rate may not be so. But while these cases may be recognized as sound and applied under proper conditions and when not a cloak for an usurious transaction, the facts do not, in our opinion, bring the present contract within the principle. This is no case where the lender entered into a partnership incurring responsibility for its debts and taking the full risks of the venture. Nor is it a loan of money in which the charge for its use is made dependent on such risks. But under the agreement, and whether the venture or enterprise succeeded or failed, there is stipulation for the repayment in any event of the full amount of the money lent and a charge for its use of 50 cents per thousand on not less than 20,000,000 feet of timber. In the citation from Paige the author further says: "If, however, the amount of probable profits is estimated in money and the share the lender is to receive is expressed in money and not expressed as a part of the profits nor made contingent on the earning of such profits, the transaction is usurious." And in the case of *Weaver v. Burrett, supra, Deemer, Judge*, delivering the opinion, quotes with approval from *Chancellor Walworth* in 2 Paige, p. 269, as follows: "Whenever, by the agreement of the parties, a premium or profit beyond the legal rate of interest for a loan or advance of money is, either directly or indirectly, secured to the lender, it is a violation of the statute, unless the loan or advance is attended with some contingent circumstances by which the principal is put in evident hazard. A contingency merely nominal, with little or no hazard to the principal of the money loaned or advanced, cannot alter the legal effect of the transaction. . . . Where there is a negotiation for a loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending: . . . and whatever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious."

It is further contended that the plea of usury is not available against these notes, because under the contract between the claimant and the corporation of date 28 May, 1907, the same were given as part of the purchase price of the property of W. T. Sears & Co. as successors to S. P. Taylor & Co.

It is undoubtedly a sound proposition that if one buys property and agrees to pay or take up a note affected with usury as a part of the purchase price, he cannot maintain the defense of usury against the note, and for the very sufficient reason that as to him the obligation is not for the loan of money. The case of *Stuckey v. Construction Co.,* 61 W. Va., p. 74, and other cases cited, are apt authorities for this position; and in our own Court *Doster v. English,* 152 N. C., 339, and *Yarboro v. Hughes,* 139 N. C., 204, are in recognition of the principle. But in our opinion no such case is presented here. As a conclusion of law, it is not a correct interpretation of the contract of 1907, that the notes given were a part of the purchase price of the assets of the partnership by the corporation, nor is there any evidence in the record that would justify or uphold such a finding of fact. Long before this, that is, shortly after the loan of the money and before any payments were made on the same, the facts show that S. P. Taylor, having retired from the firm, on receiving the cost price of his interest, the partnership of W. T. Sears & Co., composed of two of the original parties, was formed and the firm, having taken over the assets, was soon thereafter incorporated with others, and took over the assets of the last firm and assumed all of its obligations. So far as the contract concerning this loan of money was concerned, it was an arrangement by which the corporation was substituted as successor to the former parties, and this was done with the knowledge and full recognition of the claimant, Arringdale, and any and all payments under the original contract have been made by the corporation, and any and all transactions concerning it have been between the said Arringdale and the company. Accordingly, in reference to this, the referee properly finds, among other things:

"4. That after the execution of the said agreement, date 4 February, 1904, between John A. Arringdale and the firm of S. P. Taylor & Co., the said firm, in consequence of said agreement, purchased or erected a mill at Wananish, and soon after the purchase or erection of said mill, the firm of W. T. Sears & Co., composed of the said S. M. Lloyd and W. T. Sears, bought the interest of S. P. Taylor, and soon thereafter the said S. M. Lloyd, W. T. Sears, and others organized the corporation called W. T. Sears & Co., Incorporated, and all further transactions under said agreement were had between said Arringdale and said firm of W. T. Sears & Co. and said corporation."

The subsequent contract of 1907 was only to embody the results of an accounting between the parties by which the amount due under and by virtue of the original contract was ascertained, its obligations recognized, and its liens preserved. Both the recitals and the body of the contract show this to be its purpose and that the accounting was only in recognition of the position assumed by the parties in 1904 and acted on since. A case, then, is presented in which, with the consent of all the parties, the corporation was substituted as successor to the original parties, and, on the facts in evidence, the usury affecting the original obligation is not effaced or removed. In 29 Am. and Eng. Enc., p. 579, the position is recognized as follows: "In ascertaining whether a new obligation is a novation through a change in the obligors so as to relieve it of the taint of usury inherent in the original indebtedness, the fact that the obligors on the new obligation and those on the old one are not the same is not conclusive; though there is such a change, the new obligation may still be merely a renewal of or a substitute for the original usurious indebtedness and so tainted with the original usury." And the case of *Holland v. Chambers,* 22 Ga., 193, cited in support of the principle, is not unlike the one presented here.

The claims made that the plea in this case is not good for lack of a corrupt intent is without force. The corrupt intent spoken of in the decisions is the intentional charging more for money lent than the law allows, and, according to our construction, the purpose stands clearly revealed on the face of the instrument. Nor can the position be maintained that the plea of usury cannot be made by the receiver because the same is personal to the debtor. The plea of usury is open to parties and their privies. Webb on Usury, p. 417. The theory is that usury is a transaction by which a debtor's estate is wrongfully depleted, and ordinarily one having the legal right to protect the estate can avail himself of the plea. In 7 Wait's Actions and Defenses, p. 630, it is said: "The right to recover back money paid for a loan, in excess of legal interest, where that right is allowed, is not limited to the borrower. The injury done by the usurer is to the estate of the borrower, and the right to receive back the amount of interest in excess of the legal rate passes to the assignee in bankruptcy," citing *Wheelock v. Lee,* 64 N. Y., 242; and to a receiver appointed in proceedings supplementary to execution, citing *Palen v. Johnston,* 46 Bard., 21; and see *Bank v. Wareham,* 49 N. Y., 635; *Trust Co. v. Bank,* 87 Fed., 143; *In re Stern,* 144 Fed., 956; *Dunford v. Bank,* 48 Fed., 271. Our statute on the subject, Revisal, sec. 1222, would seem to be conclusive: "Such receiver shall have full power to demand, sue for, collect, receive, and take into his possession all the goods, chattels, rights, etc., . . . and to institute suits for the recovery of any estate, property, damages, or demands existing in favor of said corporation, etc." While we hold that the notes sued on are void because based entirely on a usurious consideration, we think that on the pleadings the demand by the receiver for double the amount of the usurious interest should be disallowed. Both our statutes and authoritative interpretations of it are to the effect that "Usury must be paid in money or money's worth before an action can be maintained therefor, and the renewal of a note, given for usury, does not amount to such payment." *Rushing v. Bivens,* 132 N. C., 273. The recovery sought here is in the nature of a penalty, and this being true, when the facts are known or readily obtainable, the law requires definite statement as to the time and amount before allegations in such action are held to be sufficient. 22 Pl. and Pr., p. 502; Webb on Usury, p. 556. While the facts are set forth fully in the report, the allegations in the answer are entirely too general to constitute a cause of action, and the facts do not present a case where an amendment should be now allowed in furtherance of a recovery. There is error, and the report and judgment will be reformed to accord with this decision.

Error.

APPEAL BY PLAINTIFF.

HOKE, J. The Court having held, on the appeal by the receiver in this cause, that the transaction between the claimant, John A. Arringdale, and defendant corporation was simply that of a loan of money, on usurious interest, it follows that the appellant's position, that on the facts said Arringdale was a partner, is necessarily disallowed, and the claim of said petitioner, having been declared void *in toto* because based upon a usurious consideration, the question raised by appellant as to the priority of liens between the plaintiff and said Arringdale is no longer of moment. For like reason, it is not necessary to consider or pass upon the plaintiff's plea, that the contract between the corporation and Arringdale was usurious. There is conflict in the decisions as to whether and under what circumstances another creditor may, himself, plead usury in protection of the debtor's estate. The weight of authority would seem to be against entering such a plea, under ordinary conditions. 1 Paige on Contracts, sec. 503; Webb on Usury, p. 434. Without deciding the question, however, as it is no longer involved, and under the rulings made on the receiver's appeal, the report and judgment below, sustaining the claim of the petitioner, Arringdale, will be formally reversed, and, in our discretion, the costs of the appeal will be taxed against the appellant. *Rayburn v. Casualty Co.*, 142 N. C., 376; Revisal, sec. 1279.

Modified.

J. F. DEPPE, ADMINISTRATOR OF N. R. DEPPE, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 March, 1911.)

1. **Railroads—Damages—Fire—Negligence.**

   A railroad company is not liable in damages for a fire originating off its right of way caused by a spark from its properly equipped locomotive properly managed by a competent engineer.

2. **Same—Evidence, Nonexpert—Questions for Jury.**

   In an action for damages caused by defendant's passing locomotive emitting a spark which destroyed plaintiff's dry-kiln by fire, recovery was resisted upon the ground that the locomotive was properly equipped and handled, and that the fire originated within the kiln by the overheating of the steam pipes, and that heat ascends, and consequently fire would break out in the top of the kiln first: *Held*, the opinion of witnesses was incompetent as nonexpert evidence, which was to the effect that the pipes could not have caused the fire as stated, it being the very question the jury was to decide, and in which they could draw their own inferences from the evidence.

APPEAL from *Ward, J.*, at November Term, 1910, of CRAVEN.

Civil action to recover damages for burning a dry-kiln.

The usual issues were submitted. From a verdict and judgment for plaintiff, the defendant appealed.

The facts are stated in the opinion of the Court by *Mr. Justice Brown.*

D. L. Ward, D. E. Henderson, E. M. Green, and Rodman Guion for plaintiff.

Moore & Dunn for defendant.

BROWN, J. This cause was before us at a former term, upon appeal of plaintiff, and a new trial was ordered. It now comes before us upon appeal of the defendant in a record containing thirty-two assignments of error.

It is unnecessary to consider them all, as in our opinion a new trial is necessary.

The dry-kiln was not on the right of way of the defendant, and even if it caught fire from sparks from defendant's locomotive, the defendant would not be liable, if the jury should find that the locomotive was equipped with a proper spark arrester and properly managed by a competent engineer.

The injury then would be *damnum absque injuria* and one incidental to the operation of railroads, which are a public necessity and operated for the public good.

We think his Honor's charge was clear and explicit upon this point, and generally free from error; but we think the exceptions of defendant, 2, 3, 4, and 5, to evidence received by the court, are well taken. These are all addressed to the admission by the court of opinion evidence as to how the fire originated, and each of the questions to which these exceptions are noted are similar in form, and the questions asked and the answers thereto, to which the exceptions are directed, are considered together. The witnesses were asked substantially if they were able to form an opinion satisfactory to themselves as to whether or not the steam pipes filled with steam running into the dry-kiln set it on fire, and they were permitted to give their opinions on this vital question.

The defendant relies on two defenses: (1) That its engine was properly equipped with a spark arrester and properly handled, and if the fire was caused by a spark from its engine it would not be liable. (2) That as a matter of fact, the kiln was fired from local causes not connected in any way with defendant's engine.

In support of this last contention defendant had two theories, one of which was that the kiln probably was burned from overheating by the steam pipes; that heat ascends, and consequently the fire would break out in the top of the kiln first.

The very matter upon which the witnesses were permitted to express an opinion was essentially a matter for the jury. It was their province to draw the inferences from facts in evidence, and not the province of the witnesses.

The evidence admitted was not "expert testimony" in any sense, as the facts are such that one person may as well draw conclusions from them as another. Neither can it be considered "a short-hand statement of a fact"—a term used by Mc-

Kelvey and other writers on opinion evidence. It was nothing more or less than the conclusion of a witness drawn from certain facts, which conclusion it was exclusively the province of the jury to draw.

The general rule is that the opinion of an ordinary witness is inadmissible on a question of law, or a question which it is for the jury to decide from the facts, or upon a matter requiring special knowledge or study, or upon a matter of speculation. Lawson on Expert and Opinion Ev. (2 Ed.), p. 557; *Smith v. Smith,* 117 N. C., 326; *Hoffman v. R. R.,* 51 Mo. Ap., 274. There is nothing to take this case out of that general rule. There are cases in our Reports where expert and nonexpert opinion evidence has been allowed, but all of them are easily distinguished from this. *Wilkinson v. Dunbar,* 149 N. C., 21; *Davenport v. R. R.,* 148 N. C., 294; *Lumber Co. v. R. R.,* 151 N. C., 221.

New trial.

J. M. SHERROD AND N. J. MAYO, ADMINISTRATOR OF J. W. SHERROD, v. B. F. DAWSON, SHERIFF OF EDGECOMBE COUNTY, AND J. C. CRAWFORD, SHERIFF OF MARTIN COUNTY.

(Filed 15 March, 1911.)

1. **Counties—Taxation—Conflicting Demands—Injunction—Parties—Misjoinder—Removal of Causes—Discretion of Court—Procedure.**

This action involves a controversy between two counties as to which is entitled to assess taxes upon the same personal property, consisting of solvent credits. The sheriff of one county seized the property in the hands of an administrator as that of a deceased resident, and the sheriff of the other claims it as that of one of its citizens to whom the deceased is alleged to have duly assigned it before June 1. The administrator of deceased and the alleged assignee seek to enjoin the sheriffs of both counties from selling the property for taxes, offering to pay into court the taxes on the larger amount assessed: *Held,* (1) the main relief is that by injunction, and the injunction should be continued; (2) the pleadings relate to one transaction, and there is no misjoinder of parties; (3) the plaintiffs could elect to sue in either county; (4) the question of the removal of the action in effect involved the contest of the two counties over a fund and within the discretion of the trial judge; (5) the right of either county to the tax depended upon the place of residence of the true owner, a question of fact for the jury under conflicting evidence; (6) the plaintiffs should not be required to pay the tax and sue the respective counties to recover it back; (7) the remedy by injunction is the proper one. Revisal, secs. 821, 2855.

2. **Taxation—Enforcement—Executors and Administrators—Parties—Procedure—Priorities.**

It is the duty of an executor or administrator to pay the taxes of deceased out of the trust funds in his hands, and the statute prescribes that "such liability may be enforced by an action against him in the name of the sheriff," Revisal, sec. 2862, giving certain priorities prescribed by Revisal, sec. 89.

APPEAL from *Peebles, J.,* heard at chambers, 6 January, 1911.

This is an action brought by plaintiffs in the Superior Court of Edgecombe County to restrain the defendants from selling the property of plaintiffs pending the determination of this action, in which is involved the legality of certain taxes levied by the commissioners of Edgecombe and Martin counties upon the same personal property, to wit, certain solvent credits.

The cause was heard by his Honor at chambers, who rendered judgment vacating the restraining order theretofore granted. From his judgment plaintiffs appealed.

Bunn & Spruill for plaintiffs.
H. A. Gilliam for defendant Dawson.
Harry Skinner for defendant Crawford.

BROWN, J. The facts as presented by the record are that certain notes and mortgages, solvent credits, are in the hands of J. P. Bunn, an attorney of Rocky Mount, N. C.

The Board of Commissioners of Martin County entered said personal property on the tax lists of that county after the death of Dr. J. W. Sherrod, who died intestate in that county on 7 November, 1909, claiming that said solvent credits were his property and that they had never been listed for taxation.

It is admitted that Dr. J. W. Sherrod was a resident of Martin County at the time of and for years before his death. It is admitted that the defendant Crawford has advertised certain cotton and lands belonging to said estate, and in the hands of N. J. Mayo, administrator, for sale to pay said assessment. The tax levied by the commissioners of Martin amounts to $1,690.85.

The plaintiff John M. Sherrod is the son of Dr. J. W. Sherrod, and has been for some years a citizen and resident of the county of Edgecombe. It is alleged, and plaintiffs offered affidavits in support thereof, that this identical property in the hands of J. P. Bunn was duly transferred and assigned prior to 1 June, 1905, by said J. W. Sherrod to his son, John M. Sherrod, who has been a citizen and resident of Edgecombe County ever since.

On the first Monday of April, 1910, after due notice to John M. Sherrod, the Board of Commissioners of Edgecombe County assessed a tax of $1,831.18 against this property, claiming that the said solvent credits belong to John M. Sherrod, a resident of that county, and have belonged to him since prior to 1 June, 1905.

The defendant Dawson, Sheriff of Edgecombe County, is endeavoring to collect this tax out of the property of the plaintiff John M. Sherrod.

The plaintiffs ask to be permitted to pay into court the larger sum assessed, $1,831.18, to abide the judgment of the court as to which county the taxes on said property rightfully belong, and that the defendants be enjoined from selling the property of the plaintiff John M. Sherrod, or of the estate of J. W. Sherrod.

The contention that there has been a misjoinder cannot be sustained. All the averments in the pleadings relate to one transaction and one cause of action, to wit, a permanent injunction to prevent the sale of plaintiff's property. *Fisher v. Trust Co.,* 138 N. C., 224; *Ricks v. Wilson,* 151 N. C., 48.

All parties in interest are before the court, and its judgment will be binding upon them. If two separate actions were brought, one in Martin and one in Edgecombe, conflicting verdicts and judgments may be rendered and the result be that the authorities of two counties might levy and collect taxes upon identically the same personal property.

The motion to change the venue and remove the cause to Martin County was properly denied.

The cause could have been properly instituted in either county, and the plaintiffs had the right to sue in Edgecombe rather than in Martin, where defendant Crawford resides.

The Superior Court, upon application, may remove the cause to some adjoining county for trial of the issues, as this is practically a contest between two counties over a certain fund; but that is a matter in the sound discretion of that court. It would seem proper that the cause should be determined in a disinterested county.

We are of opinion that plaintiffs are entitled to injunctive relief, upon paying into court the larger sum claimed by the defendant Dawson on behalf of the county of Edgecombe.

It is contended that the plaintiffs should pay the taxes assessed in Martin and Edgecombe counties and sue the counties to recover it back. This position is untenable. The imposition of the tax by one county or the other is clearly illegal. The right to levy the tax depends upon who was the true owner of the property at the time when the taxes accrued. Property of this character is subject to taxation only where the true owner resides. The legality of either tax can only be determined when the residence of the real owner shall be ascertained and fixed by the jury.

An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Revisal, secs. 821 and 2855. *Purnell v. Page,* 133 N. C., 125.

In the case of *Lumber Co. v. Smith,* 146 N. C., 199, which was an action brought to collect taxes on solvent credits, *Justice Connor,* writing the opinion of the Court for an undivided bench, held that injunction is the proper remedy as against delinquent taxes illegally sought to be collected. Upon the same point see, also, *Armstrong v. Stedman,* 130 N. C., 217; *Ins. Co. v. Stedman,* 130 N. C., 221.

In this case the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself a main relief, for, assuredly, as to one or the other county, the tax is illegal and invalid.

In the case of *Hyatt v. DeHart,* 140 N. C., 270, this Court held that it is the general rule that the Court will not dissolve an injunction where the main relief demanded in the action is injunctive.

In *Purnell v. Page,* 133 N. C., 129, the present *Chief Justice* spoke for the Court in these words: "As to the other point, whether the plaintiff can maintain an injunction against the sale of his property under an illegal tax, or must pay the tax under protest and sue to recover it back, it is equally well settled that he can pursue either remedy. *Range Co. v. Carver,* 118 N. C., 331; *Armstrong v. Stedman,* 130 N. C., 217; *Brinkley v. Smith,* 130 N. C., 224, hold that under the language of the statute injunctive relief may be invoked by a taxpayer when the tax is invalid or illegal."

In respect to the right of the defendant Crawford, as Sheriff of Martin County, to levy on the lands and cotton belonging to the estate of Dr. Sherrod for the collection of this tax levied and placed upon the lists after his death, or even before his death, it is to be observed that the method of collection of taxes against the estate of a decedent is regulated by section 2862, Revisal, which makes it the duty of the executor or administrator to pay the taxes out of the trust funds, and prescribes that "such liability may be enforced by an action against him in the name of the sheriff."

All taxes owing by a decedent are given a certain priority and are placed in class 3 of schedule of debts. Revisal, sec. 89.

These statutes plainly indicate that the ordinary methods of collecting taxes by a sheriff do not apply to the collection of taxes from a decedent's estate.

These plaintiffs, however, do not seek to restrain or delay the collection of the tax. They admit that the tax is due to one county or the other. They only ask to restrain the sale of their property in case they pay the largest amount claimed into court to abide the result of the action. It is but reasonable that their prayer should be granted.

It is therefore decreed that upon payment of the larger sum named herein into the office of the Clerk of the Superior Court of Edgecombe County an injunction issue against the defendants Dawson and Crawford, as prayed.

The costs of this appeal will be taxed against the defendants.

Reversed.

J. J. CARSON v. J. R. BUNTING AND SOUTHERN OIL COMPANY.

(Filed 5 April, 1911.)

1. **Appeal and Error—Issues of Fact—Questions for Jury.**

   In the defendant's appeal it appears that the jury found for plaintiff upon matters of fact properly submitted, and no error is found.

2. **Contracts—Sale of Fertilizer—Damages to Crop—Vendee's Duty —Knowledge.**

   The plaintiff brings his action to recover damages to his crop arising from a breach by defendant of its contract to furnish him with a certain quality of cotton-seed meal to be used as a fertilizer, and acknowledged that he discovered the defects in time to have procured other fertilizer of the kind required, which he could have obtained: *Held*, it was incumbent upon plaintiff to avoid any damages arising from defendant's failure to properly perform his contract, and he could not recover the damages sought in this action.

3. **Penalty Statutes—Violation—Amount—Legislative Discretion.**

   The penalty prescribed by Revisal, sec. 3956, relating to sales of fertilizers, is a matter resting within the legislative discretion, and is prescribed as a punishment to enforce the execution of the law, in addition to compensation recoverable for the damages sustained.

4. **Penalty Statutes—Judicial Notice—Pleadings—Proof.**

Section 3956 of the Revisal imposes a penalty for the violation of the law by those selling fertilizers, for protection to the farmers in their use, and, being a public statute, the courts will take judicial knowledge thereof and permit a recovery thereunder, though not specially pleaded, when there is allegation and proof that section 3957, relating to the sale of cotton-seed meal as a fertilizer, has been violated.

5. **Same—Cotton-seed Meal.**

When there is allegation and proof that one selling to the user cotton-seed meal as a fertilizer has failed to show, by branding on the bags or tags attached, the amount of ammonia or nitrogen, or the name of the manufacturer, as required by Revisal, sec. 3957, the penalty prescribed by section 3956 is recoverable, though this section be not pleaded. The demand for relief is immaterial, and a judgment should be rendered as justified by the pleadings and proof.

6. **Same—Relief Demanded.**

Upon allegation and proof that defendant has sold plaintiff cotton-seed meal to be used by the latter as fertilizer, without branding or tagging the bags as required by Revisal, sec. 3957, the fact that the plaintiff demands relief under section 3960 does not prevent his recovery of the penalty prescribed by section 3956.

WALKER, J., concurring; BROWN, J., dissenting.

APPEAL by defendants from *Ward, J.,* at December Term, 1910, of PITT.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Jarvis & Blow and Harry Skinner for plaintiff.
L. I. Moore for defendants.

CLARK, C. J. The complaint alleges three causes of action:

1. For shortage in the quantity and quality of cotton-seed meal purchased from the defendant. On this issue the plaintiffs recovered $150, and the defendant appealed.

2. The second cause of action is for the penalty prescribed in the statute in selling the cotton-seed meal without having branded or tagged thereon the data required by the statute.

3. The third cause of action was for injuries sustained by

the plaintiff's crop by reason of defendant's failure to deliver the quantity and quality of cotton-seed meal as set out in the first cause of action. On the last two causes of action the court instructed the jury to answer the issues in favor of the defendant, and the plaintiff appealed.

DEFENDANT'S APPEAL.

It was admitted by the defendant, as to the first cause of action, that it contracted to exchange with the plaintiff cotton-seed meal for fertilizing purposes for cotton seed at the rate of 1,333$\frac{1}{3}$ pounds of meal for a ton of seed. There was evidence from which the jury found that the cotton-seed meal delivered was short in quantity and quality to the amount of $150. This was purely a question of fact, and we find no error in the trial, as to the defendant's appeal.

PLAINTIFF'S APPEAL.

The third cause of action alleges shortage in the yield of the crop of plaintiff caused by the shortage in the quantity and quality of the cotton-seed meal, as alleged and found in the first cause of action. The plaintiff testified that he had ascertained the defective quantity and quality of the meal when he used it. His measure of damage is an abatement in the price. This has been allowed him on the first cause of action. He does not allege that he could not have bought other cotton-seed meal to have made good the deficiency. In fact, he admits in his evidence that he could have done so. He is not entitled to consequential damages for the resulting shortage in his cop. Knowing the deficiency, it was incumbent upon the plaintiff to have avoided any damages from the failure of the defendant to comply with his contract if he could have done so by reasonable and proper effort.

The second cause of action is for the recovery of the penalty of $10 per bag on 196 bags cotton-seed meal sold to plaintiff in violation of the provisions of the Revisal in regard to tagging and branding fertilizers and fertilizing material sold to others than manufacturers.

Revisal, 3957, prescribes: "All cotton-seed meal offered for sale, unless sold to manufacturers in manufacturing fertilizers, shall have plainly branded, on the bag containing it, or on a tag attached thereto, the following data:

"1. Cotton-seed meal, with brand.

"2. Weight of package.

"3. Ammonia or nitrogen.

"4. Name and address of manufacturer."

It was alleged in the complaint and shown in the proof that the said 196 bags were not sold to a manufacturer for use in manufacturing fertilizers, but were sold to the plaintiff, who is a farmer, to be used for fertilizing purposes, and neither of said bags had stamped thereon the above designated data, and that neither was tagged as required by said section, in that the tags attached thereto did not contain the data required in the third and fourth items, to wit: (3) Ammonia or nitrogen. (4) Name and address of manufacturer.

Pell's Revisal, 3965 (Laws 1907, ch. 670), makes the same requirements with some additions, as to branding "any commercial fertilizer or fertilizing material," and Revisal, 3956, prescribes: "Every merchant, trader, manufacturer or agent who shall sell or offer for sale any commercial fertilizer or fertilizing material without having attached thereto such labels, stamps, or tags as are required by law . . . shall be liable to a penalty of $10 for each separate bag, barrel, or package sold, or offered for sale or removed, to be recovered by any person who shall sue for the same."

The evidence is plenary that this cotton-seed meal, 196 bags, was sold by the defendant to the plaintiff without compliance with above provisions of the statute. This statute is an exceedingly important one to the farmers of the State to prevent fraud and imposition upon them in the sale of fertilizers and fertilizing material. The requirement of a penalty for the violation of a statute is a matter which rests in the discretion of the legislative department, without reference to the amount of damages sustained. The penalty is for punishment to enforce the execution of the law, and is in addition to compensation for the damages sustained. *Grocery Co. v. R. R.,* 136 N. C., 404; *Walker v. R. R.,* 137 N. C., 168.

The defendant contends, however, that the plaintiff has not brought himself within the provisions of the statute, in that he has asked for a penalty under section 3960, alleging failure to attach the tax tags, which showed the receipt of the taxes required by that section, while the evidence shows that the tax tags were in fact attached.

In an action for a penalty, the statute allowing the same, being a public one, need not be pleaded. *Currie v. R. R.,* 135 N. C., 536; *Comrs. v. Comrs.,* 101 N. C., 520. But the facts must be alleged upon which the statute authorizes the penalty. Upon the evidence the defendant failed to comply with the requirements of Revisal, 3945, 3956, and 3957, and it is alleged in the complaint that those sections are not complied with. There was *allegata* as well as *probata.* It is true that the complaint also alleges a failure to affix the tax tags as required by Revisal, 3960, and it was shown that these were in fact affixed.

It is also true that the complaint asked to recover penalties for failure to affix the tax tags, Revisal, 3960, but there is both allegation and proof of failure to comply with sections 3945, 3956, and 3957. It is well settled that "under The Code the demand for relief is immaterial, and the court will give any judgment justified by the pleadings and proof." See numerous cases cited, Clark's Code (3 Ed.), p. 584, and notes to section 425; *Walker, J., Voorhees v. Porter,* 134 N. C., 597; *Gillam v. Ins. Co.,* 121 N. C., 372. Upon the pleadings and proof the plaintiff is entitled to recover upon the second cause of action.

In defendant's appeal, No error; in plaintiff's appeal, on the second cause of action, Error; third cause of action, Affirmed.

WALKER, J., concurring: I concur in the opinion of the Court as delivered by the *Chief Justice,* but will add a few observations in regard to the form of the complaint and the construction of the statute or sections of the Revisal, relating to penalties for not stamping fertilizers. It is so notorious that cotton-seed meal is a fertilizer and an article of commerce, that it would seem, at least, proper for us to take judicial notice of the fact without hesitation, and without waiting to be specially informed of the fact. But however this may be, the Legislature, in the section to which reference has been made, clearly recognizes it as such, and requires it to be so stamped as to show brand, weight, quantity of ammonia or nitrogen, and name and address of manufacturer. It is immaterial whether the stamp is required to show the same data as the stamp on other fertilizers, which, for the sake of convenient distinction, may be considered as strictly commercial. That is not the question. The statute (Revisal, sec. 3957) denominates cotton-seed meal a fertilizer, or at least as fertilizing material, and subjects it to inspection and disclosure of its contents just as other "fertilizers or fertilizing material." Stamping was considered just as necessary in the one case as in the other, the idea being to protect the unwary farmer against the purchase of spurious articles—to shield him from the impositions and fraudulent practices and devices of the wicked and designing manufacturer, for the law will interfere with none but the latter. The same reason for branding the one applied equally to the other, as the farmer can be defrauded in the sale of meal as well as if it were what is called commercial or standard fertilizer. The law does not deal so much with names as with things. The words "commercial fertilizer" are not used in the body of section 3945, but by the Revisers, in the title to the subchapter, and the data required by that section to appear on the label are the same in form as those which section 3957 provides shall be stamped on packages containing cotton-seed meal, except that "phosphoric acid and potash," not being ingredients of the meal, are substituted for "ammonia," which is one of its constituent elements. The language of section 3956, imposing the penalty, is general in its terms, and applies to the sale of "commercial fertilizers and *fertilizing material,*" without affixing the proper tags, labels, and stamps to the packages. The words "fertilizing material" certainly embrace cotton-seed meal, which is itself a fertilizer, if it is not within the meaning of the term "commercial fertilizer"; but it cannot well be doubted, I think, that it is. Commerce (in its larger sense) comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of our country and those of other nations, and between the citizens of different States, or it may be localized, when it consists in trade, dealings, or mutual traffic within the limits of a State or between individuals in different communities, or even the buying, selling, and exchanging of articles between members of the same community. Black's Dict. (1891), p. 225. Webster defines it generally as "the exchange or buying or selling of commodities," without special regard to its territorial range or limit. Any commodity which is the subject of this sale, exchange, or barter can very properly be called "commercial," if there is any magic in the name or importance to be attached to it. But the language of the statutes is quite sufficient to classify cotton-seed meal with all other fertilizers in construing them for the purpose of ascertaining the real intention of the Legislature. The buyers are furnished precisely the same protection in the purchase of it as is done in the case of other fertilizers. This being so, it would seem to follow logically, and as the clearly expressed purpose of the Legislature, that persons or corporations selling cotton-seed meal should be subject to the same pains and penalties, under section 3956, when violating the provisions for labeling or stamping, as dealers in the other kinds of fertilizers described in section 3945, which section is expressed almost identically as section 3957, and at least substantially so. The language of section 3956 is broad enough to include cotton-seed meal within its penalizing provisions, and this was evidently the intention of the Legislature, for where there is the same reason, there should be the same law. But it suffices to say that section 3956, by its very words, penalizes the sale of any fertilizer or fertilizing material which is sold or exchanged for the ultimate purpose of being used in the enrichment of the soil, where the bags or packages are not branded as required by sections 3945 and 3957. It is true that sections 3945 and 3956 are taken from the act of 1901, ch. 479, and section 3957 is a part of the act of 1903, ch. 339; but in this way the section penalizing the general offense of selling unstamped fertilizers was automatically extended to a new case arising and coming within its provisions, which is not unusual. When the law, by the act of 1903, declared that cotton-seed meal should be classed with other fertilizers and that the particular articles proposed to be turned into the channels or arteries of commerce should carry with them the badge of their purity, or, more properly speaking, their genuineness, there is no stretch of construction when we say that the then existing provisions of the law intended to safeguard the farmer against fraud and deceit in the sale of such commodities, so essential, not only to his, but to the general welfare, should be extended to such a case. If there is a general law punishing larceny, or deceit which is a form of stealing in disguise, should we say that it is not applicable to an act which is afterwards made a larceny or a criminal deceit? My own mind inclines the other way. We should so construe the law as not to disappoint the declared will of the people, when through their representative body—the Legislature—it is clearly expressed, although by different enactments. Our law punishes felonies and misdemeanors differently, drawing the dividing line between them; but will it not be admitted that as new felonies or misdemeanors are created by statute, they are subject to the provisions of existing laws in regard to their punishment? Or if a new offense is created, and a penalty had theretofore been imposed for like offenses, then that the penalty attaches to the new unlawful act, if it comes within the mischief? I must think so. But all the enactments were revised and compiled in 1905, and they appear in the Revisal of that year. I cannot better state my view than by adopting what I find in one of the best commentaries on the subject, 1 Lewis Sutherland Statutory Construction (2 Ed.), sec. 269: "Revision of statutes implies a reëxamination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the Legislature say the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute; it displaces and repeals the former law as it stood relating to the subjects within its purview. Whatever of the old law is restated in the revision is continued in operation as it may operate in the connection in which it is reënacted. A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must on principles of law, as well as in reason and common sense, operate to repeal the former. *Bartlett v. King,* 12 Mass., 545. Where a provision is amended by the form, 'to read as follows,' the intention is manifest to make the provision following a substitute for the old provision and to operate exclusively in its place. Does a revision import that it shall displace the last previous form; that it is evidently intended as a substitute for it; that it is intended to prescribe the only rule to govern? In other words, will a revision repeal by implication previous statutes on the same subjects, though there be no repugnance? The authorities seem to answer emphatically, Yes. The reasonable inference from a revision is that the Legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law."

The different provisions of a revisal of the laws must be construed together so as to harmonize them and give effect to each, without regard to their consecutiveness, but with special regard to the fact that they relate to the same subject-matter, and tend to one common end or purpose. Lewis' Sutherland Statutes and

St. Const., sec. 268. "Where two statutes *in pari materia,* originally enacted at different periods of time, are subsequently incorporated in a revision and reënacted in substantially the same language, with the design to accomplish the purpose they were originally intended to produce, the times when they first took effect will be ascertained by the courts, and effect will be given to that which was the latest declaration of the will of the Legislature, if they are not harmonious." *Ibid.,* sec. 281. But these acts are harmonious, for they have a common and general purpose to prevent frauds upon the innocent farmer, who, however intelligent and wise he may be, can be easily duped and deceived by hidden defects in fertilizers, and thereby lose, not only his crop, but all the cost and labor of making it. This is the reason for imposing a penalty for the willful deceit, and it is just and right under the circumstances. An honest farmer should not be made to lose the fruit of his sweat and toil by the deliberate fraud of the dishonest manufacturer, and a State, if it permits such a miscarriage of justice, fails in its duty to those under its protection. It is a law to protect the innocent against the evil designs of those who are willing to take advantage of them, and we should so construe it, without laying any particular stress upon the order in which the sections are placed in the Revisal, or the arbitrary division of titles, which should be confined to its only purpose—the convenience of reference.

The complaint is sufficient in substance to permit a recovery for the penalties imposed by section 3957. It states the facts which bring the plaintiff's case within section 3957, the violation of which is denounced with a penalty by section 3956. The mere fact that the plaintiff asks for other relief does not deprive him of that to which the facts he alleges entitle him to have. *Knight v. Houghtalling,* 85 N. C., 17; *Voorhees v. Porter,* 134 N. C., 591; *Silk Co. v. Spinning Co., ante,* 421; Clark's Code (3 Ed.), sec. 233, pp. 200 and 201 and notes. It is too late now to question the well-settled rule of pleading and procedure. It applies to all kinds of actions, even actions for penalties. We are bound to take notice of public statutes and their provisions, and to give relief in cases in accordance with them. We must also bear in mind that the common-law system of pleading, with all its technicalities and refinements, has been swept away, at least so far as its forms and fictions are concerned, and we hear cases now upon their real merits and administer rights and award relief accordingly.

The suggestion that the defendant is indictable and has been indicted and convicted for this same offense is without any force, when we know that a violation of the other sections for selling unstamped fertilizers is a misdemeanor and also subject to a penalty by Revisal, sec. 3822; and that section. by the way, brings the unlawful sale of all fertilizers required to be branded under one and the same condemnation of the law, showing that the Legislature regarded cotton-seed meal as being in the same category with all other fertilizers.

Penal statutes should be construed strictly—this is elementary; but, at the same time, and with equal reason, they should be construed sensibly and reasonably, so as to fulfill the object of the law, and not to defeat it. The fact that section 3956 precedes section 3957 does not require us to decide that its penal provisions are not, therefore, applicable where there has been a violation of section 3957. They are both but parts of one compilation of the laws, *in pari materia,* and intended by the Legislature to be construed together. Section 3822 of the Revisal, making it a misdemeanor to sell fertilizers or fertilizing material without having tags or labels attached thereto as required by law, was a part of chapter 479 of the Laws of 1901, and we have held at this term, in *State v. Cotton Oil Co., post,* that the fact of the passage of that act before the act of 1903, ch. 339 (Revisal, sec. 3957), did not take that case out of the provisions of the former section, and a conviction for selling without labels was sustained. Even a cursory reading of that case should convince us that we have already decided the question involved in this one against the present contention of the defendant. It is there said in so many words that section 3956 subjects to a penalty any one selling cotton-seed meal in violation of section 3957, and that the penal and punitive clauses of that section apply alike to the sale of all kinds of fertilizers required to be labeled. The failure to attach the tax tags, under section 3960, is subject to a separate penalty, and a penalty for the same kind of offense is imposed as well in the case of all other fertilizers. It is a distinct subject of regulation to prevent the State from being defrauded of its revenue. Our recollection is that counsel did argue that they were not confined to a recovery of that penalty, but that plaintiff is entitled to the relief which is fitted to the facts alleged in his complaint; and this, as we have seen, is a correct proposition of law.

My apology, if one is needed, for a discussion of this subject must be found in its great importance to the public, for whose benefit and protection these statutes were passed.

My conclusion is that the judgment should be modified, as stated in the opinion of the Court.

BROWN, J., dissenting: I concur in the opinion of the Court except as to the second cause of action. As to this I am constrained to dissent. This cause of action is set out in the complaint in these words:

"For a second cause of action the plaintiff, complaining of the defendants, alleges:

"1. That of the 274 bags of cotton-seed meal sold and delivered to the plaintiff, as set out and explained in the plaintiff's first cause of action, 196 bags had tags attached thereto, which contained only these words, to wit: '1909, Department of Agriculture, North Carolina, 100 pounds of Cotton-seed Meal. Charges paid. S. L. Patterson, Commissioner.' A copy of this on said 196 bags is hereto attached as an exhibit.

"That section 3957 of the Revisal of 1905 provides: That all cotton-seed meal offered for sale, unless sold to manufacturers for use in manufacturing fertilizers, shall have plainly branded on the bag containing it, or on a tag attached thereto, the following data:

"1. Cotton-seed meal, with brand.

"2. Weight of package.

"3. Ammonia or nitrogen.

"4. Name and address of manufacturer.

"That the said 196 bags were not sold to a manufacturer for use in manufacturing fertilizers, but were sold to the plaintiff, who is a farmer, to be used for fertilizing purposes; that neither of said bags had stamped thereon the above designated data, and that neither was tagged as required by said section, in that the tags attached thereto did not contain the data required by the 3d and 4th items, to wit:

"3. Ammonia or nitrogen.

"4. Name and address of manufacturer.

"2. That section 3960 of said Revisal provides, among other things:

"That any person or persons, firm or corporation, who shall sell or offer for sale any cotton-seed meal without having the proper tax tag attached thereto, shall be liable to a penalty of $10 for each separate bag or barrel or other package sold or offered for sale, to be recovered by any person who may sue for the same.

"That plaintiff avers that defendants did actually sell to him 196 bags of cotton-seed meal without having the proper tax tag attached thereto, as alleged and set out in the preceding paragraph, and the plaintiff now claims and sues for said penalty.

"Wherefore, plaintiff now demands judgment against the defendants for the sum of $1,960 on this cause of action."

It is admitted in the complaint and is proven by all the evidence that the tax tags were attached to the 196 bags.

These tax tags are issued by the Agricultural Department as a method of collecting the tax levied by law as an inspection tax.

The statute, Revisal, 3960, upon which this cause of action is based gives the penalty solely for failure to affix the tax tag, and not for failure to stamp the formula on the bag.

The tax tag is issued by the State when the tax is paid, and as a method of collecting the tax. There is no law requiring the formula to be printed on it, but that may be stamped on the bag or on a separate tag.

The Court seems to be of opinion that plaintiff cannot recover the penalty upon the section 3960 sued on and copied in the complaint, but may recover it under section 3956.

It is singular that the astute counsel for plaintiff never made any such claim either in his brief or argument, but relied solely on the cause of action stated in his complaint.

There are two objections to a recovery of penalties under section 3956:

1st. It constitutes a different cause of action from the one sued on, and therefore the defendant had no notice of any such claim. To recover that penalty requires more and different facts to be established. There are no pertinent allegations in the complaint, and a plaintiff cannot be permitted to sue for one penalty and recover another, simply because the different penalties happen to be similar in amount. It is axiomatic that proof without allegation is as worthless as allegation without proof.

The defendant company has not had an opportunity to make its defense under section 3956, as it was sued exclusively under section 3960.

2d. I am of opinion that plaintiff cannot recover under section 3956, had he based his cause of action on that section, because it is patent that this applies exclusively to "commercial fertilizers" and not to cotton-seed meal.

The General Assembly has divided this legislation under four heads, viz.: "commercial fertilizers"; "cotton-seed meal"; "commercial feeding stuffs," and "pure food." Sections 3945 to 3956 inclusive relate to commercial fertilizers exclusively; sections 3957 to 3961 (a) to cotton-seed meal; sections 3962 to 3968 to commercial feeding stuffs, and 3969 to 3978 to pure food. These different articles of manufacture are defined and classified in The Code under the above-named heads, and the regulations and penalties applicable to each are specified with particularity under each title and are separate and distinct from each other. Section 3956 belongs to the commercial fertilizer division and section 3960, upon which the plaintiff based his demand, to the cotton-seed meal division, which is a food, but may be used in fertilizing. The data required to be stamped upon cotton-seed meal, when sold for use as a fertilizer, is very different from the formula of ingredients required to be stamped upon commercial fertilizers.

It is true that this is an important matter to farmers, and therefore the General Assembly, while prescribing a penalty for failure to attach the tax tag, made it a misdemeanor, a crime punishable by fine and imprisonment, to fail to stamp each bag of cotton-seed meal with the ingredients prescribed by the statute. This defendant company has been convicted at this term of this offense and fined for it. It is hardly probable that the General Assembly intended to both penalize and punish by fine and imprisonment for the same omission.

The words used in section 3956 are "commercial fertilizer or fertilizing material," and the analysis required to be attached thereto is prescribed in section 3945 and has no relation to cotton-seed meal, as a very cursory reading of the statute will disclose, for it is a very different formula. Section 3956 gives the penalties for failing to attach to commercial fertilizers the analysis required to be placed on them by section 3945, and has no application to cotton-seed meal.

For these reasons I think the plaintiff is not entitled to recover the penalties sued for, and that the judgment of his Honor, *Judge Ward,* is correct.

ISAAC BROWN v. D. W. HOBBS.

(Filed 5 April, 1911.)

Judgments—Payments—Motions to Enter Satisfaction—Lands—Parol Contracts—Statute of Frauds.

Upon a motion to enter satisfaction of a judgment under Revisal, sec. 579, a defendant may not set up his parol executory agreement to convey lands to plaintiff for that purpose, such not being in the purview of the statute and not enforcible by him under the statute of frauds.

CLARK, C. J., and WALKER, J., concurring; BROWN, J., concurring in the concurring opinion of WALKER, J.

APPEAL by defendant from *Whedbee, J.,* at August Term, 1910, of DUPLIN.

This is a motion by defendant, under section 579 of the Revisal, to enter satisfaction of a judgment rendered in favor of the plaintiff at August Term, 1907, of the Superior Court of Duplin County.

The defendant offered affidavits to prove that on 13 April, 1908, he sold to the plaintiff a lot in Warsaw, at the price of $1,600, on condition that said judgment should be satisfied as a part of the purchase price; that he had tendered a deed to the plaintiff pursuant to the contract of sale, which the plaintiff refused to accept.

The plaintiff admitted that he had entered into a contract of purchase, alleged that the same was in parol, and contended that the deed tendered did not embrace all the land in the contract.

It was admitted that the contract was in parol and that the plaintiff contended that the deed tendered was not in accordance with the agreement.

His Honor dismissed the motion, and the defendant excepted and appealed.

F. R. Cooper for plaintiff.
Stevens, Beasley & Weeks for defendant.

ALLEN, J. This seems to be an ingenious effort upon the part of counsel for defendant to enforce a parol contract in regard to land. The section of the Revisal (579) under which the motion is made was intended to give the judgment debtor a speedy and inexpensive remedy when he had made payments which the creditor refused to enter on the judgment. The procedure under the motion is clearly stated in the statute.

We do not think it was intended to embrace a controversy like this, growing out of an independent contract, which may be the subject of another action. The statute says the remedy by motion may be had "when any payment has been made on any judgment."

The defendant has paid nothing. On his own showing, he has entered into an entire contract, void under the statute of frauds, and the plaintiff claims that he is not willing to perform this.

We agree with his Honor that these controversies cannot be settled in this motion.

Affirmed.

CLARK, C. J., concurring: The statute of frauds, Revisal, 976, makes void, not the promise to pay, but only "the contract to sell or convey" realty, when not in writing. The construction that the defendant only can plead the statute makes its application depend upon the accident of the position of the parties to the action. The more reasonable construction is that the "party to be charged" means "the party sought to be charged" with the conveyance of realty.

In 29 A. and E. Enc. (2 Ed.), 808, it is said, citing many authorities: "The vendee in a parol contract for the sale of land cannot set up the statute where the vendor is ready and willing to perform and seeks to recover the purchase money." To the same effect are *Holland v. Hoyt*, 14 Mich., 238; *Burke v. Wilbur,* 42 Mich., 328, which hold that the statute of frauds "does not require the agreement of a vendee to pay the purchase money to be in writing." To the same tenor, *Washington Glass Co. v. Masbaugh,* 19 Ind. App., 105; *Taylor v. Russell,* 119 N. C., 30; *Harty v. Harris,* 120 N. C., 410; *McNeill v. Fuller,* 121 N. C., 213; *Bank v. Loughran,* 126 N. C., 818; *Rogers v. Lumber Co.,* at last term, *ante,* 108, and many other cases in this and other courts. There are authorities to the contrary. The point is an open one, and it may be well to settle it by amendment of the statute. It does not arise for decision in this case.

It would seem clear upon the reason of the thing that as a verbal contract for the payment of money is good and enforcible when given for all other considerations, there is no cause to construe the statute of frauds to make it invalid when the consideration is realty. The mischief intended to be remedied by the statute of frauds is solely the obtaining an interest in land under a verbal conveyance or contract, and it was intended as a protection to the vendor only. There is no protection needed by the purchaser more than by any one else who gives his verbal promise, upon a consideration proven or admitted, to pay money.

WALKER, J., concurring: I assent to the affirmance of the judgment in this case, for the reasons stated in the opinion of the Court, one of which reasons is that the contract for the sale of the land is not enforcible against the plaintiff, who is protected by the statute of frauds. He denies the contract as set out by the defendant, and the statute, therefore, is sufficiently pleaded (*Bonham v. Craig,* 80 N. C., 224); but, in addition to the denial, he specially pleads the statute. If the plaintiff had executed to the defendant a deed for the land, and all of the judgments against the defendant had been paid, except the sum of $492.66, which by the agreement of the parties, if admitted, was to be applied in satisfaction of the judgment, a different question from that presented in the record might be raised, and perhaps, as the contract would be *pro tanto* executed by a delivery of the deed, the plaintiff could not keep the land by claiming under the deed, and avail himself of the statute, in order to escape performance of his part of the contract to pay the balance of the purchase money or apply it to the satisfaction of the judgment. It might well be contended, then, that by retaining the deed as his own, he would thereby affirm the contract and become liable for the purchase money. *Smith v. Arthur,* 110 N. C., 401; *Rice v. Carter,* 33 N. C., 298; *Choate v. Wright,* 113 N. C., 289; *Drake v. Howell,* 133 N. C., 168. The statute was enacted to prevent frauds and not to encourage them. But I need not stop to inquire how such facts, if they existed, would affect the rights or remedy of the defendant (who is the actor in this case, the plaintiff, alleged vendor, being the party to be charged), for the contract relied on by the former is purely executory in its terms. Neither party has performed his part of it, if it ever was made. In this state of the facts, the plaintiff can successfully resist the motion of the defendant under the statute. He occupies the right position in the proceeding, for the defendant seeks to "charge him," or, in other words, to enforce a performance of the contract by him. With respect to the plea of the statute of frauds, there is no right or "wrong end of the contract." It might be proper to say that a party is at the "wrong end" of the suit to plead the statute, for if he were not the defendant, or the party against whom it is sought to enforce the contract, whether plaintiff or defendant, vendor or vendee, he might, in a general sense, be said to occupy the wrong position in the case for that purpose. *Judge Pearson* crystallized the true doctrine when he said in *Rice v. Carter,* 33 N. C., 298: "The object of the statute was to secure the defendant." He, of course, referred not only to a party whose nominal position on the record is that of a defendant, but to one whose real and substantial position is such, as being the party sought to be charged by an enforcement of his part of the contract. This Court dealt with the very question in *Hall v. Misenheimer,* 137 N. C., 184, and it is just as well to reproduce what was then said as to restate the doctrine. It is an important one in pleading and practice, as well as in its direct application upon the rights of parties with respect to their contracts which fall within the provisions of the statute. It was said in that case:

"But we think there is a serious obstacle in the way of plaintiff's recovery. The statute expressly requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith or by his lawfully authorized agent. The Code, sec. 1554. In order, therefore, to charge a party upon such a contract, it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement, which has been signed by the party to be charged, or by his agent lawfully authorized thereto. *Gwathmey v. Cason,* 74 N. C., 5 (21 Am. Rep., 481), especially at page 10, where *Rodman, J.,* states the rule. *Miller v. Irvin,* 18 N. C., 104; *Mizell v. Burnett,* 49 N. C., 249, 69 Am. Dec., 744; *Rice v. Carter,* 33 N. C., 298; *Neaves v. Mining Co.,* 90 N. C., 412;

Mayer v. Adrian, 77 N. C., 83. Many other cases could be cited from our Reports in support of the rule, but those we have already mentioned will suffice to show what is the principle, and how it has been applied. In commenting on the policy of the statute, so far as it affects the vendee, and answering a suggestion that the statute applies only to the vendor, who alone conveys the land or any interest therein, *Ruffin, C. J.,* for the Court, in *Simms v. Killian,* 34 N. C., 252, says: 'The danger seems to be as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of the land. Hence, the act in terms avoids entirely every contract of which the sale of land is the subject, in respect of a party—that is, either party—who does not charge himself by his signature to it after it has been reduced to writing.' So in a case where a stipulation that the vendee would open a street, which constituted a part of the price to be paid for the land, was not stated in the writing, it was held by this Court that the vendor could not recover for a breach of the stipulation, because, being a part of the price, it was also a part of the agreement, and was not evidenced by a writing which had been signed by the defendant. *Hall v. Fisher,* 126 N. C., 205; *Ide v. Stanton,* 15 Vt., 685, 40 Am. Dec., 698. The fact that the defendant in this case paid $5 on the purchase money and took possession of the land, does not change the result. The doctrine of part performance is not now recognized by this Court.

"The party to be charged upon a contract, within the meaning of the statute, is the defendant in the action, or the party against whom it is sought to enforce the obligation of the contract. It is not the vendor, unless he occupies upon the record the position of the party who is called upon to perform his contract. . . . Anything said in *Taylor v. Russell,* 119 N. C., 30, in conflict with this view of the statute cannot, we think, be sustained. *Green v. R. R., supra,* which is cited in *Taylor v. Russell,* does not support the proposition that the vendee is not protected by the statute. In that case the plaintiff, who was the vendee, sued the defendant, who was the vendor, to recover the value of the wood which he agreed to give for the land at a stipulated price. The Court held merely that as the plaintiff had sued on the contract and the defendant had waived the statute, he was bound by its terms and must recover, if at all, not the value of the wood, but the price agreed upon. He could not in such case repudiate his contract, when defendant was willing to perform it. In support of this ruling, the Court cited *Mizell v. Burnett, supra,* which case directly sustains the doctrine as we have stated it. The defendant, therefore, can avail himself of the statute as the party to be charged."

We cite in support of the principle as thus stated, the following cases: *Mizell v. Burnett,* 49 N. C., 249; *Love v. Welch,* 97 N. C., 200; *Green v. R. R.,* 77 N. C., 95; *Love v. Atkinson,* 131 N. C., 544. The case last cited, decided some time after *Taylor v. Russell,* is directly in point, and the full purport of the case is thus stated in the syllabus: "The vendor who signs a contract for the sale of land cannot enforce payment of the purchase money by the vendee, if he has not signed the contract, though the vendee has paid a part of the purchase money and has been put in possession." In *Davis v. Martin,* 146 N. C., 281, *Justice Brown* said: "The fact that the plaintiffs did not sign the contract will not avail defendants. It was duly executed, delivered, and registered, and is binding on the party to be charged. The plaintiffs are not the parties to be charged, within the meaning of the statute of frauds. They stand by their contract to pay, and seek to charge the defendants with its performance." In *Bank v. Loughran,* 126 N. C., 814, the vendee had executed notes for the purchase money, and the action was brought to recover the amount of the notes. He could not, of course, plead the statute to defeat his own written and signed promise to pay money. *McNeill v. Fuller,* 121 N. C., 209, was like *Bank v. Loughran, supra*—an action on notes given for the purchase money of land. It is true that *Justice Furches,* who wrote the opinion in *Taylor v. Russell,* uses this expression, "But if there was no bond, the defendants are at the wrong end of the contract to plead or take advantage of the statute of frauds"; but this was a *dictum,* and a clear inadvertence, as it is opposed by all the best considered cases on the subject. Nor does *Harty v. Harris,* 120 N. C., 410, apply. The point was not made in the case. The present *Chief Justice* well says, at the conclusion of the opinion: "The statute of frauds cuts no figure. It is not pleaded, nor is the contract of leasing denied. On the contrary, the party who might plead the statute avers and is relying on the contract. The only controversy is as to its terms and legal effect. *Taylor v. Russell,* 119 N. C., 30. Besides, if the lease were void under the statute of frauds, the lessors could only recover for the time the premises were occupied. The Code, sec. 1746." That is in harmony with *Smith v. Arthur, Hall v. Misenheimer,* and the other cases; but all of the cases cited, except *Taylor v. Russell* and *McNeill v. Fuller,* in which *dicta* to the contrary will be found, are far from even intimating that there is a "wrong end of the contract," and that the party who is unfortunate to be at that end is not in the protection of the statute. The case of *Rogers v. Lumber Co.,* at last term, *ante,* 108, did not present the question now being considered, as will appear from the following extract: "It has been suggested that said promise was void because it was an agreement in regard to an interest in land, and should have been in writing. Revisal 1905, sec. 976. But this was an executed and not an executory contract to convey an interest in land. That had already been done in the written contract. Besides, this is not pleaded. This was a stipulation to assume the payment of a certain sum of money." It is true that *Taylor v. Russell* is cited in that case, and with reference to it the following is said: "That case cites *Green v. R. R.,* 77 N. C., 95, and other cases which hold that the promisor to pay money 'is at the wrong end of the contract' to object that the agreement is not in writing. This has been cited and affirmed in *Harty v. Harris,* 120 N. C., 410, 27 S. E., 90; *McNeill v. Fuller,* 121 N. C., 213, 28 S. E., 299; *Bank v. Loughran,* 126 N. C., 818, 36 S. E., 281; *Davis v. Martin,* 146 N. C., 281, 59 S. E., 700." But this may serve to explain what was meant in *Taylor v. Russell* by the words: "He is at the wrong end of the contract to do this"—that is, to plead the statute of frauds. In *Taylor v. Russell* the action was between two partners who had agreed upon terms of settlement of their affairs, one of which was that the plaintiff should convey to defendant one-half interest in a mill site and improvements, the defendant having received a large part of the assets of the concern. Plaintiff asked for an account. It was held that in equity the agreement, so far as it related to the mill site, would be deemed as executed, and the title to one-half thereof as vested in the defendant. "If the plaintiff is ready and willing to convey, as he alleges he is, equity will consider that which should be done as done, and the defendant, in equity, a joint owner of this property." This brought the case within the ruling in *Smith v. Arthur, supra,* as the contract was treated, whether rightly or wrongly, as executed. By what was said in regard to the "wrong end of the contract" was meant, perhaps, that as the defendant had received his share, he could not plead the statute so as to prevent the plaintiff from complying with his part of the contract by executing the deed as evidence of the defendant's title to the land. If it meant any more than that, it is not in alignment with the well-settled doctrine of the courts. The promise in *Rogers v. Lumber Co., supra,* was an original one—not a promise to answer for the debt of another—and the statute did not apply in any view of the facts. We have seen that *Green v. R. R., Harty v. Harris, Davis v. Martin,* and other cases cited do not decide that the application of the statute is to be determined by the relative position of the party who pleads it, in the contract, whether at one "end" or the other, but his position on the record, as nominally or substantially a defendant or "the party to be charged." The decision in *Rogers v. Lumber Co.* did not turn upon the position of the parties with reference to the contract, but upon the conceded fact that the promise attempted to be enforced was an original one and not one to answer for the debt of another, and neither party could rely on the statute to defeat the other. It is clear that a mere "promisor to pay money" for a good consideration moving directly to him from the party to whom the promise is made, is not in a position to plead the statute of frauds, for he is not within either its letter or spirit.

The view herein taken of the statute is supported not only by our own decisions, but by those in other jurisdictions. The rule is stated, as I understand it to be, in 20 Cyc., at page 272, with a copious reference in the notes to the authorities, as follows: "A party not signing the memorandum obviously cannot be charged on the contract; but in England, and generally in the United States, the only signature made necessary by the statute is that of the party against whom the contract is sought to be enforced. . . . In reference to contracts for the sale of land it is generally held, as in other agreements within the statute of frauds, that the party not signing the memorandum is not bound; but that the only signature required is that of the party against whom the contract is sought to be enforced." In *Morin v. Martz,* 13 Minn., 191, it is said: "It will also appear from the authorities cited, that the language, 'who is to be charged by it,' is held equivalent to the language, 'who is to be charged by it in the suit,' or 'against whom it is sought to be enforced.' . . . It would seem that by a strong and united current of authority the signification of the words 'parties to be charged therewith,' or of words equivalent in the statute of frauds, has been settled by adjudication reaching over a very long period of time." In the leading case of *Laythoarp v. Bryant,* 29 Eng. C. L., 469 (7 Bing. N. C., 35), the vendee only had signed the memorandum upon which the suit was brought against him, and he was held to be bound as the party to be charged. *Chief Justice Tindal,* referring to the words of the statute, unless the contract or some memorandum thereof shall be in writing and signed by the party charged therewith, inquired, "By what party?" He answered his own question thus: "By the party to be charged therewith—the defendant in the action." He then added that, "The object of the statute was to secure the defendant's signature, and the whole purpose of the Legislature is answered when we put this construction on the statute. When the party who has signed is the one to be charged, he cannot be subject to any fraud." In this respect the English statute and ours are worded alike. In 1 Reed on Statute of Frauds, vol. 1, sec. 359, and p. 578, it is said: "Whether he be vendor or vendee is immaterial; the vendee, if defendant, must sign, and the vendor, if defendant, must sign. The vendee, if plaintiff, does not have to sign." The cases on this point are numerous and uniform in holding according to the rule I have stated: *Martin v. Mitchell,* 2 Jac. and W., at p. 426; *Seton v. Slade,* 7 Vesey Ch. Rep., 265-275; *Newby v. Rogers,* 40 Ind., 9; *Dressel v. Jordan,* 104 Mass., 412; *Justice v. Lang,* 42 N. Y., 493-501; *Ives v. Hazard,* 67 Am. Dec. (4 R. I., 14), 500; *Black v. Crowther,* 74 Mo. App., 480; *Houghwont v. Boisanbin,* 18 N. J. Eq., 315; *Bowers v. Whitney,* 88 Minn., 168; *Appeal of McFarson,* 11 Pa. St., 503; *Raphael v. Hartman,* 87 Ill. App., 634; *Hodson v. Carter,* 3 Pinney (Wis.), 212. An instructive case is *Marqueze v. Caldwell,* 48 Miss., 23, in which the Court reviews the authorities, and says at p. 31: "The statute exacts that the contract or agreement, or some note or memorandum thereof, shall be signed by the person to be charged. It is said by Sugden on Vendors, p. 99, 'that he who signs will be bound, although the other party did not sign.' If the suit be against the party who signs, the statute is satisfied, for he is the party charged. This author states that this view of the statute has been sustained by the authority of *Lords Keepers North* and *Wright, Lord Hardwicke, Ch. Bar. Smith, Lords Eldon, Thurlow,* and *Sir William Grant.* Browne in his Treatise on the Statute, p. 385, says: 'It is now uniformly held that the signature of the defendant in the suit, alone, or the party who is to be charged upon the agreement, is sufficient.' . . . *Chancellor Kent,* in *Clason v. Bailey,* 14 Johns., 484, after a very thorough review of the English cases, came to the conclusion that 'The point is too well settled to be now questioned.' " In *Hodson v. Carter, supra,* the clear result of the cases is thus expressed: "It required the memorandum to be 'signed by the parties to be charged by such contract.' And yet this language has been construed as not requiring the signature of the parties to be charged with the contract, but as requiring simply the signature of the party to be charged by the suit. And this construction has been established, in spite of the earnest protest of *Lord Redesdale,* through a series of adjudications, both at law and in equity, in England and in this country, by a weight of authority quite beyond the limits of questioning, and almost above the reach of criticism. See, for a review of these authorities, *Clason v. Bailey,* 14 Johns., 484." Equally positive and strong is the language of the Court in *Justice v. Lang, supra:* "The end and object of the statute are obtained by written proof of the obligation of the defendant; he is the party to be charged with a liability, dependent on and resulting from the evidence, and he is intended to be protected against the dangers of false oral testimony. To say that the plaintiff or the party seeking to enforce a contract is himself a party to be *charged* therewith is a perversion of language." And in *Newby v. Rogers, supra,* the rule is thus tersely stated: "When the statute speaks of the 'party to be charged,' it must be understood to mean the defendant to the action. The note or memorandum must be signed by him, but need not be signed by the plaintiff." *Sir Thomas Plumer,* Master of the Rolls, in *Martin v. Mitchell, supra,* said that "The word 'charge' evidently means charged in the action. When you file a bill, you attempt to charge the defendant; and if he has signed the agreement, it is signed by the party to be charged, and it seems to follow that he cannot take advantage of the statute." See, also, *Williams v. Robinson,* 73 Me., 194; *Improvement Co. v. Guthrie,* 116 N. C., 381; *Foust v. Shoffner,* 62 N. C., 242. *Davis v. Yelton,* 127 N. C., 348, is very much in point. Vendor had signed memorandum to convey land to vendee, who, in his turn, had verbally promised to pay $400 for it. Suit was brought by vendor for specific performance and defendant (vendee) pleaded the statute of frauds. The court refused to permit the introduction of parol evidence to show the defendant's promise to pay the purchase money, and charged that the plea of the statute was good and plaintiff could not recover. This Court held that the charge was correct, and affirmed the judgment, citing *Rice v. Carter,* 33 N. C., 298; *Wade v. New Bern,* 77 N. C., 460, and *Gwathmey v. Cason,* 74 N. C., 5, as controlling authorities which sustained the ruling.

The following authority, 29 Am. and Eng. Enc. (2 Ed.), 808, and the cases cited in note 6, viz., *Holland v. Hoyt,* 14 Mich., 238; *Burke v. Wilber,* 42 Mich., 327; *Washington Glass Co. v. Masbaugh,* 19 Ind. App., 105, will be found, upon careful examination, to be based upon statutes worded differently from ours, and, besides, the decisions were made upon executed contracts, and it appears, too, that the vendees had either given notes for the purchase money or signed a memorandum.

My conclusion is that the statute of frauds, which was relied on by the plaintiff in this case, defeated the defendant's recovery, apart from the other reason assigned by the Court.

JUSTICE BROWN concurs in opinion of JUSTICE WALKER.

FLORENCE V. DOWDY v. J. T. DOWDY.

(Filed 5 April, 1911.)

1. **Appeal and Error—Verdict Set Aside—Discretion—Reason Given.**
   Whatever may have been the reason given by the trial judge in setting aside a verdict, no appeal will lie when it actually appears that he had set it aside as a matter within his discretion.

2. **Appeal and Error—Appeal Dismissed—Decision—Supreme Court's Discretion.**
   Though an appeal be dismissed by the Supreme Court as premature, the Court may, in its discretion, consider the questions presented.

3. **Divorce a Mensa—Abandonment—Cruel Treatment.**
   Abandonment by the husband of his wife in an action by the latter for divorce may be proved by such acts of the husband as amount to cruel treatment sufficient to compel her to leave home.

4. Same—Wife's Conduct—Burden of Proof.

The wife in showing abandonment, by her husband's conduct in compelling her to leave home, in her action for divorce must also show that his cruel conduct was unwarrantable, and not the proximate cause of her own acts done at the time.

5. Divorce a Mensa—Issues—Misconstruction—Wife's Conduct.

In this action for divorce issues were submitted upon the question of the husband's abandonment and that of the indignities to the wife's person such as would render her condition intolerable, etc.: *Held*, a third issue, "Was the plaintiff a dutiful wife and without blame on her part?" was too broad, and open to misconstruction.

ALLEN, J., did not sit on the hearing of this case.

APPEAL from *W. R. Allen, J.*, at August Term, 1910, of CHATHAM.

Action for divorce from bed and board. These issues were submitted without objection:

1. Did the defendant abandon the plaintiff, as alleged? Answer: Yes.

2. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome? Answer: Yes.

3. If so, was the plaintiff a dutiful wife and without blame on her part? Answer: No.

The plaintiff tendered judgment upon these issues and findings, which the court declined to sign. Plaintiff excepted and appealed.

Hayes & Bynum for plaintiff.
H. A. London & Son for defendant.

BROWN, J. The record states that the court declined judgment for plaintiff upon the ground that the plaintiff was not entitled thereto upon the findings to the issues. His Honor then set aside the verdict in the exercise of his discretion, but would not have done so if he had not been of opinion that the plaintiff was not entitled to judgment on the verdict.

The action of his Honor in setting aside the verdict in his discretion and ordering a new trial is not affected by the reason given for it. Had he dismissed the action, holding that upon the issues plaintiff could not recover, an appeal would lie. But as no judgment was rendered, no appeal can be entertained. Clark's Code (3 Ed.), sec. 548, and cases cited; *Taylor v. Bostic,* 93 N. C., 415.

While the appeal must be dismissed as premature, in the exercise of our discretion, we will consider the question presented. *S. v. Wylde,* 110 N. C., 502; *Milling Co. v. Finlay,* 110 N. C., 411.

The complaint sets up various acts of cruelty and barbarity covering most of the period of time during which the plaintiff and defendant resided together. On 20 May, 1908, plaintiff avers that she was compelled to leave the home of the defendant because of such treatment. She also avers that she has been a true and faithful wife and gave her husband no just cause for such treatment, and in her amended complaint she sets out in detail the conduct of herself and her husband upon the occasions when the cruel and brutal treatment was inflicted upon her.

The answer denies each allegation of the complaint except the averment of marriage.

It has been repeatedly held that in an action for divorce from bed and board by the wife she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation upon her part. *Martin v. Martin,* 130 N. C., 28; *O'Connor v. O'Connor,* 109 N. C., 139; *Jackson v. Jackson,* 105 N. C., 433; *White v. White,* 84 N. C., 340.

It is not claimed in this case that the defendant departed from his home and abandoned the plaintiff, but the averment is that the wife was compelled to leave the defendant on account of his cruel treatment. While this is in law an abandonment by the husband (*High v. Bailey,* 107 N. C., 70), yet, as a ground for divorce, it is dependent upon the establishment of the acts of cruelty which it is averred compelled plaintiff to leave her home, and of the further fact that such acts were not the consequence of any adequate provocation upon the plaintiff's part.

As has been said: "A wife is not entitled to a divorce by reason of the cruelty of her husband if she is a woman of bad temper and provokes his ill usage. Her remedy in such cases is by her changing her manners." Shel. Marriage and Divorce, 431; *White v. White,* 84 N. C., 343.

Upon the uniform precedents it would appear that plaintiff was not entitled to judgment in consequence of the response to the third issue.

As the case is to be tried again, we suggest that this issue is too general in its terms and open to misconstruction. His Honor had to explain to the jury that the question of the wife's moral delinquency was not involved, and that the words "without blame" did not imply that she had led a blameless life.

The matter at issue is, not as to whether the plaintiff is a good woman, or a good wife, but whether the acts of cruelty which she sets out in her complaint, and which she says compelled her to leave her husband, were brought about by the unwarranted conduct at the time of the plaintiff herself. *O'Connor v. O'Connor, supra; McQueen v. McQueen,* 82 N. C., 471; *Joyner v. Joyner,* 59 N. C., 322. In other words, the wife must show that she was not herself of such "contributory negligence" as was the "proximate cause of the injury."

The appeal is
Dismissed.

MAGGIE ROLLINS v. J. A. WICKER.

(Filed 5 April, 1911.)

1. **Lands—Title—Plaintiff's Legitimacy—Defendant's Title.**
In an action for possession of lands, wherein the plaintiff's title depended solely upon the question of her legitimacy, a finding by the jury as to defendant's title is not material, as plaintiff must depend upon the strength of her own title.

2. **Lands—Title—Legitimacy—Declarations—Court Records—Secondary Evidence.**

The plaintiff sued for possession of lands, and her title thereto depended solely upon her legitimacy. It was proper to exclude the evidence of a witness, who was a juror in a former action wherein the defendant was not a party, which was offered for the purpose of showing that therein the jury found the question of legitimacy in plaintiff's favor, there being no evidence, among other reasons, that the court record had been lost or destroyed.

3. **Same.**

Only duly exemplified and authenticated copies of the records in judicial proceedings are competent to prove their contents, and parol evidence of their contents is secondary and inadmissible evidence unless the original record is lost or destroyed or cannot be produced.

4. **Evidence—Declarations—Legitimacy—Ante Litem Motam.**

Declarations of deceased persons as to the legitimacy of the plaintiff, offered in an action involving that question, are incompetent if not made *ante litem motam.*

5. **Same—Time.**

For declarations of deceased persons to be competent with respect to their having been made *ante litem motam*, they must be free from suspicion of bias and must have been made before the beginning of the controversy, which is not necessarily the commencement of the action; and testimony of such persons given at a former trial involving the same questions as in the present one is incompetent.

6. **Evidence—Objections and Exceptions.**

A general objection to evidence which is partly competent cannot be sustained; the objection should specify the grounds thereof and be confined to the incompetent evidence.

7. **Evidence—Legitimacy—Declarations—Ante Litem Motam—Pedigree—Independent Recollection.**

In an action for possession of land, wherein plaintiff's title depended solely upon her legitimacy, objection was made by her to the testimony of defendant's witness, who stated that he remembered the time of the marriage; that plaintiff's mother (now deceased) came through his yard "that morning and said she had been married that day," and that plaintiff was then 2 or 3 years old. The evidence held competent, as a declaration relating to pedigree, it having been made by the mother *ante litem motam*, and being her spontaneous exclamation as to an event then uppermost in her mind, was free from any suspicion of error; besides, the mother's declaration was a circumstance which tended to fix in the witness's mind the fact that, at that time, he had knowledge of the marriage and of plaintiff's age.

APPEAL by plaintiff from *W. R. Allen, J.,* at November Term, 1910, of LEE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Q. K. Nimocks for plaintiff.

A. A. F. Seawell and D. E. McIver for defendant.

WALKER, J. This is an action for the recovery of land. Plaintiff claimed that she inherited the land from her father, Thomas Rollins, and the sole question in the case is as to her legitimacy. Her father and mother were married at the time of his death. The evidence as to the time of the plaintiff's birth was conflicting. The jury found that Thomas Rollins owned the land at the time of his death; that plaintiff is not his heir at law, and, therefore, is not the owner of the land. There was a finding as to defendant's title, but that is not material, as plaintiff must recover upon the strength of her own title, and cannot rely on the weakness of defendant's.

In order to show that plaintiff was the legitimate child of Thomas and Rachel Rollins, the plaintiff proposed to prove by a witness named Kelly that he was a juror in the trial of a case formerly pending in Moore County, wherein the plaintiff in this case, but not the defendant, was a party, and which involved the legitimacy of the plaintiff, and that the jury found as a fact that the plaintiff was the legitimate child of Thomas and Rachel Rollins. An objection to this evidence was sustained, and the plaintiff excepted. The ruling was correct. That was not the way to prove the fact, even if the evidence was otherwise competent. The record itself is the primary and only competent proof of its contents, unless it has been lost or destroyed, and there was no suggestion that it had been. Secondary evidence is admissible when the original cannot be produced. *Varner v. Johnston,* 112 N. C., 570; *In re Thorp,* 150 N. C., 487. "It may be stated generally that the record, or, in proper cases, certified or duly exemplified *and* authenticated copies thereof, should be produced to show transactions in judicial proceedings, and, when a matter is of record, parol evidence is not, ordinarily, admissible to show the contents of the record." 1 Elliott on Evidence, sec. 212.

The plaintiff offered to prove by the same witness what was the testimony of Joseph Buchanan (a deceased kinsman of the plaintiff) in the trial of the other case as to plaintiff's legitimacy, and that it tended to establish the fact. This evidence was properly excluded. It does not appear that the declaration of the deceased relative was made *ante litem motam.* This expression is not restricted to the date of the commencement of the present suit, but to the beginning of the controversy. In order to avoid the mischief which would otherwise result, "all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected. This rule of evidence was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to an earlier period of the controversy. But in our law the term *lis* is taken in the classical and larger sense of *controversy,* and by *lis mota* is understood the commencement of the controversy and not the commencement of the suit. The commencement of the controversy has been further defined by Mr. Baron Alderson, in a case of pedigree, to be 'the arising of that state of facts on which the claim is founded, without anything more.'" 1 Greenleaf on Evidence, sec. 131. The value of this kind of evidence depends upon its being drawn from an unbiased source, and it should emanate from those in a situation favorable to a knowledge of the truth, and, what is a very important consideration, it should refer to a period "when this fountain of evidence was not rendered turbid by agitation." Section 132. In the same section a very apt illustration, applicable to this case, will be found, for it is there said: "In this case (*Freeman v. Phillips,* 4 M. and S., at page 497), it was observed by one of the learned judges that 'the distinction had been correctly taken that, where the *lis mota* was on the very point, the declarations of persons would not be evidence; because you cannot be sure that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who embark, to a certain degree, with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources.'" 2 Wigmore on Ev., secs. 1482 and 1483; *Westfeldt v. Adams,* 131 N. C., 379. In our case it appears that a controversy existed, as to the plaintiff's legitimacy, at the time of the alleged declaration, when it is supposed that the mind of the declarant was not evenly or nicely poised, but may have been leaning toward one side, with the temptation to exceed or fall short of the truth. The proposed testimony should be free from suspicion. 2 Wigmore, sec. 1482 and notes.

Sam Godfrey, defendant's witness, was permitted to testify, against plaintiff's objection, as follows: "I remember the time of the marriage. Rachel Jane came through my yard that morning and said she had been married that day. Plaintiff was then two or three years old." It was competent for witness to state that he remembered the time of the marriage and that plaintiff was then two or three years old, and as the objection went to the entire evidence, it would fail. *Barnhardt v. Smith,* 86 N. C., 473. In *S. v. Ledford,* 133 N. C., at page 722, we said: "The objections are general, and the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence. Unless this is done, he cannot afterwards single out and assign as error the admission of that part of the testimony which was incompetent. *Barnhardt v. Smith,* 86 N. C., 473; *Smiley v. Pearce,* 98 N. C., 185; *Hammond v. Schiff,* 100 N. C., 161; *S. v. Stanton,* 118 N. C., 1182; *McRae v. Malloy,* 93 N. C., 163. The same rule applies to an objection to the judge's charge, when it consists of several propositions. *Bost v. Bost,* 87 N. C., 477; *Ins. Co. v. Sea,* 21 Wall., 158. Some of the evidence objected to by the defendant was clearly admissible." But waiving this well-settled rule, we think it was competent for the witness to state that

Rachel Jane Rollins, plaintiff's mother, who was then dead, told him of her marriage immediately after it occurred. No controversy of any kind had arisen at that time in regard to the plaintiff's legitimacy, and the case shows that what she said was the natural and spontaneous expression of a thought then uppermost in her mind—a mere exclamation, and absolutely free from any suspicion of error or perversion of the truth. There was no motive whatever to falsify the fact. "It has long been the recognized rule to admit declarations of ancestors to prove pedigree, marriage, and heirship. This is considered by some law-writers as an exception to the hearsay rule, and that the exception is founded in the necessity for its admissibility. Ancestry, relationship, and descent are questions which are scarcely susceptible of proof except by what has been said about them by persons in a position to know, not so much the actual kinship one person bore to another, as the kinship which one person said he bore to another, or which one person was reputed to bear to another. But whatever may be the philosophy either of the origin or the growth of the rule, it nevertheless exists under certain limitations. The necessity is said to have arisen from the difficulty of proving such facts many years, and sometimes generations, after they have taken place. Under this rule of necessity, it has been held competent to prove declarations both as to issue and marriage." 3 Elliott on Evidence, sec. 2195 and sec. 2494. In Greenleaf on Evidence (16 Ed.), sec. 114f, it is said that, "The term 'pedigree' embraces not only descent and relationship, but also facts of birth, marriage, and death." Abbott Trial Ev. (2 Ed.), secs. 34, 35 *et seq.; Dawson v. Mayall,* 45 Minn., 408. The last-cited case holds that in this way the times of those events may be shown. This kind of evidence was said by this Court in *Morgan v. Purnell,* 11 N. C., 95, to be competent (opinion of *Judge Henderson*). As to the date of the marriage, the witness said that he remembered the time of the marriage, and that in the morning of the day when it took place the plaintiff's mother passed through his yard and said she had been married that day, and that at that time the plaintiff was three years old. This evidence, as to what she said, was admissible, as a circumstance to fix in the witness's mind the time to which he referred, as having knowledge of the fact, and to enable him to state whether the plaintiff was then born and, if so, how old she was at that time. He does not say that he acquired his knowledge of the time of the marriage from what Rachel said to him. The fair inference from his testimony is that he then had knowledge of the fact and merely referred to her remark as calling his attention to the fact stated by him, of which he had independent knowledge, and to quicken his recollection as to when he first acquired knowledge of the time of the marriage. In other words, he was reminded by her statement that he had already known of the marriage that day, and that the plaintiff was then three years old. Such a statement is not hearsay, within the proper meaning of that term, but is an original and independent fact, and therefore admissible. *S. v. Fox,* 25 N. J. L., 566; *Harris v. R. R.,* 78 Ga., 525.

The assignments of error cannot be sustained.

No error.

W. W. KITCHIN, GOVERNOR, v. W. P. WOOD, STATE AUDITOR.

(Filed 12 April, 1911.)

1. **Mandamus—Auditor—Ministerial Duty.**
   At the suit of the Governor, a mandamus will lie to compel the Auditor to perform the purely ministerial duty of preparing the forms for assessing and taxing property by the assessors and list takers required by our Constitution and revenue acts.

2. **Constitutional Law—Provisions Self-executing—Power of Courts.**
   A constitutional provision may be self-executing, and when such is the case, and it is called in question, the courts will so declare it.

3. **Constitutional Law—Provisions Self-executing.**
   It is within the power of those who adopt a constitution to make some of its provisions self-executing.

4. Same—Property and Poll Tax—Equation—Legislative Discretion.

Section 1, Article V of the Constitution of this State, requiring that the General Assembly "shall levy a capitation tax on every male inhabitant of the State, which shall be equal to the tax on property valued at $300 in cash," is mandatory and self-executing, and leaves nothing to the discretion of the lawmaking powers.

5. Same—Auditor—Forms—Mandamus—Procedure.

In our Constitution the property tax is the standard of equation, and by it the poll tax must be measured, and when the Legislature has not observed this equation in levying the poll tax and providing machinery for its collection, the error can be corrected by a mathematical calculation; and at the suit of the Governor a mandamus will lie against the Auditor to compel him to prepare the forms for assessing and taxing the polls in accordance with section 1, Article V of the Constitution. *Russell v. Ayer*, 120 N. C., 180, overruled.

HOKE, J., concurs in result.

From WAKE. Heard by *Daniels, J.,* at chambers, 5 April, 1911.

Proceedings in *mandamus.* The respondent demurred to the petition. Upon the hearing the demurrer was sustained. Plaintiff appealed.

The facts are stated in the opinion of the Court by *Mr. Justice Brown.*

Attorney-General T. W. Bickett and Assistant Attorney-General G. L. Jones for petitioner.

B. F. Dixon for respondent.

BROWN, J. This proceeding is instituted by the Governor against the Auditor of this State to obtain a peremptory mandamus commanding the Auditor to prepare forms for assessing and taxing property for taxation by the assessors and list takers under the Constitution and the Revenue Act of 1911, chapter 46, Public Laws of 1911, fixing the capitation tax at $1.35 and commanding the Auditor to transmit said forms to the clerk of the board of commissioners of each county, as required by law. The Revenue Act of 1911, chapter 46 of the Public Laws of 1911, fixed the capitation tax at $1.29, and the total property tax at 45 cents *ad valorem* on every $100 value of real and personal property.

In sustaining the demurrer, his Honor very properly followed the decision of this Court in exactly a similar case. *Russell, Governor, v. Ayer, Auditor,* 120 N. C., 180.

That the Governor may prosecute a proceeding of this character against the Auditor to compel the performance of a mere ministerial duty is held by all the justices in that case, but the Court was divided upon the question of the propriety of granting the relief prayed.

The majority of the Court were of opinion that in failing to observe the mandate of the Constitution in fixing the poll tax, the constitutional equation was violated and the revenue act for that year was rendered in all its parts null and void.

The matter is very fully discussed in the opinion of the Court by *Justice Montgomery* and the concurring opinion of *Justice Furches,* and in the two dissenting opinions of *Justices Clark* and *Douglas.*

With entire deference for the views of the majority, we have reached the conclusion that section 1, Article V of the Constitution of this State is mandatory, self-executing, and leaves nothing to the discretion of the lawmaking power.

Its plain mandate is that the General Assembly "shall levy a capitation tax on every male inhabitant of the State, which shall be equal to the tax on property valued at $300 in cash."

As said by the Attorney-General, "In the execution of this command the General Assembly acts in a purely ministerial capacity. Its function is executive and not legislative. It is made the agent, the accountant, of the Constitution, with directions to make a calculation and record it."

Although a Constitution is usually a declaration of the fundamental law, serving either to command or restrict its creatures, it is entirely within the power of those who adopt a Constitution to make some of its provisions self-executing. *Ill. Cent. R. R. v. Ihlenberg,* 75 Fed., 875.

It is well said that, "A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the Legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern Constitution." *Lamborn v. Bell,* 18 Col., 349; *Willis v. Mabon,* 48 Minn., 140.

In the learned dissenting opinion of the present *Chief Justice* in *Russell v. Ayer,* many cases are collected giving instances of self-executing provisions in State constitutions.

As to whether a particular constitutional provision is self-executing seems to be one of intention to be gathered from the instrument itself and determined by the language used and the purpose intended to be carried out.

The provision in our organic law is complete in itself, needs no legislation to give it effect and no special means for its enforcement. Provisions of that character are regarded as self-executing. *Groves v. Slaughter,* 15 Peters, U. S., 449; *Davis v. Burke,* 179 U. S., 399; *Newport News v. Woodard,* 7 Am. and Eng. Anno. Cases, 627, and cases cited in notes.

Touching this subject, the Illinois Court says: "Where it is apparent that a particular provision of the organic law shall go into immediate effect, without ancillary legislation, and this can be determined by giving full force and effect to all its clauses relating to the same subject, and the language is free from ambiguity, then it becomes the imperative duty of judicial tribunals to declare it self-executing; and where the provision is unambiguous, and the purpose of the provision would be frustrated unless it is given immediate effect, it will be held self-executing." *Tuttle v. National Bank of Republic,* 161 Ill., 497, reversing 48 Ill. App., 481.

It is too plain for argument that in our Constitution the property tax is the standard of equation, and by it the poll tax must be measured. When the former is fixed by the General Assembly the latter becomes automatic, so to speak. It adjusts itself, and is arrived at by multiplying the tax on $100 of property by three. The Legislature can neither add to it nor subtract from it.

We must credit the General Assembly with the purpose to conform its legislation to the plain mandate of the Constitution. Doubtless, it intends to do; but by some oversight, when it added 2 cents more on property for school purposes, as the legislative history of the act shows, it omitted to add 6 cents to the poll. But, fortunately, no legislation is needed to correct the error. It will correct itself. The Legislature has levied a poll tax and provided machinery for its collection, but that tax lacks 6 cents of meeting the unbending requirement of the Constitution.

A capitation tax having been levied and machinery for its collection provided, we see no good reason why, as to the amount of such tax, the courts shall not compel the taxing officers to observe the plain letter of the organic law.

In the recent case of *R. R. Co. v. Comrs.,* 148 N. C., 225, some doubt is cast upon the position taken by the majority of the Court in *Russell v. Ayer,* and now, after further and careful consideration, we are of opinion it was not well decided.

The demurrer is overruled and the cause is remanded, to the end that a *mandamus* issue as prayed.

Reversed.

W. C. WOLFE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 12 April, 1911.)

1. **Evidence—Negative of a Positive Character.**

Evidence negative in form may partake of an affirmative character, as when a witness testifies to listening for approaching locomotives at a railroad crossing and not hearing one, or the usual signals, such as ringing the bell or blowing the whistle, etc.

2. Railroads—Crossings—Warnings—"Look and Listen"—Obstructed View—Negligence.

When there is evidence that the plaintiff was injured by defendant's locomotive coming without warning or signals while he was crossing the track; that before crossing he had listened for the approach of locomotives without hearing any, and that the one causing the injury came unexpectedly from a direction where the view was obstructed by cars standing on the track, the question of defendant's negligence is a proper one for the jury.

3. Same—Contributory Negligence—Exceptions.

A person in attempting to cross a railroad track must both look and listen when he gets within the zone of danger, and while his failure to do so ordinarily bars his recovery for an injury received by reason of his attempting to cross, yet attendant circumstances may so qualify this obligation as to require the question of contributory negligence to be submitted to the jury.

4. Same—Master and Servant—Scope of Employment.

At a public crossing over defendant's road where there were a large number of defendant's railroad tracks, plaintiff was employed by it as a watchman to warn those desiring to cross of danger in their doing so which might then exist. At the time in question plaintiff, in the discharge of his duties, desired to warn a person preparing to cross of his danger from a shifting engine, and, after listening for the approach of locomotives without hearing anything, attempted to cross the track for the purpose of the contemplated warning, and was injured by an engine of defendant passing on the main line. There was evidence tending to show that the plaintiff was watching the shifting engine and the person he desired to warn, at the time he received his injury, and that the engine which injured him came without signals or warnings from a direction where the view was obstructed by cars standing on side or lateral tracks to the main line: *Held*, (1) under these circumstances the defendant owed plaintiff the positive duty by active vigilance to warn him, by proper signals, of the approach of the locomotive, and the question of contributory negligence was properly submitted to the jury; (2) the plaintiff was not held to have assumed the risks of the defendant's negligent failure to give the proper signals or warnings of its passing locomotive.

5. Same—Rule of the Prudent Man—Instructions.

The plaintiff, employed by defendant to warn those desiring to cross its many tracks at a public crossing of any danger which might exist, was injured by a passing locomotive while endeavoring to discharge his duties under circumstances which rendered the issue of contributory negligence a proper one for the jury, and it is held that this case is governed by the "rule of the prudent man," and that the trial judge properly instructed the jury that it was plaintiff's duty to exercise all reasonable vigilance by looking as well as listening for approaching trains as the circumstances and his occupation and duty to the traveler permitted; and that if he failed to do so, it was such contributory negligence as barred his recovery.

APPEAL from *W. R. Allen, J.*, at October Term, 1910, of ANSON.

Civil action for personal injury. The usual issues of negligence, contributory negligence, and damage were submitted to the jury. The response to each issue was in favor of plaintiff.

From the judgment rendered, the defendant appealed.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

Redwine & Sikes, Robinson & Caudle, and Williams & Lemmond for plaintiff.

John D. Shaw and Murray Allen for defendant.

BROWN, J. The three exceptions to evidence are without merit and need not be discussed, nor do we deem it necessary to discuss *seriatim* the numerous exceptions to the charge.

The plaintiff was defendant's watchman at a crossing in Monroe, over which there were nine railroad tracks. This crossing is within the corporate limits and is used by a very large number of people, in consequence of which defendant employed plaintiff as a watchman to keep a lookout and conduct persons and vehicles safely across.

On 25 August, 1906, the plaintiff was on duty at the crossing and saw a wagon and a man walking beside it approaching the tracks for purpose of crossing. At the moment plaintiff was standing at the end of the freight depot, under the eaves, out of the rain, which plaintiff says was the only shelter he had. Shifting was going on on one of the tracks and cars were standing on the "house track." When plaintiff discovered the man and his wagon, he started to walk across the tracks to him to tell him he could soon pass. As he crossed the main-line track a passing engine struck his leg and injured him.

1. It is contended by the defendant that there is no evidence of negligence.

The negligence consists in the alleged failure of the engineer to ring his bell in approaching this crossing, as required by the rules of the defendant, or to give any other signal.

In respect to this, plaintiff testifies: "Just before I started, I listened for a train and did not hear any; did not hear any whistle or bell; did not hear the approach of any engine or train on that side. I could not see the engine on the main line; there were cars on the house track between me and the main line." This testimony, while negative in form, partakes of an affirmative character. It is the evidence of one whose personal safety was at stake, who was on the track and who had every opportunity and reason to listen intently for an approaching engine. He says he listened and could hear no bell or other signal.

In *Strickland's case,* 150 N. C., 7, relied on by the learned counsel for defendant, Mr. Allen, the testimony of the witness Whitley was wholly negative and worthless. He crossed the track 200 yards ahead of an approaching train and did not see the headlight on the engine. He was a casual passer, and did not say that he looked in the direction of the engine. Evidently he had no reason to look. There is therefore a marked difference in the character of Whitley's evidence and that of this plaintiff's. We think his Honor properly submitted the matter to the jury.

2. It is contended that upon the plaintiff's evidence he was guilty of contributory negligence as matter of law because he failed to look for the approaching engine before he crossed the main-line track, and therefore the motion to nonsuit should have been sustained.

We recognize the rule as laid down in a multitude of decisions of this and other courts that a person in attempting to cross a railroad track must both look and listen when he gets within the zone of danger, and a failure to do so is such negligence as bars a recovery for injury sustained. *Cooper's case,* 140 N. C., 209; *Coleman's case,* 153 N. C., 322. But, as said in the latter case, there are "exceptions to this as well as most other rules." And as said in *Sherrill's case,* 140 N. C., 255, "attendant circumstances may so qualify this obligation to look and listen as to require the question of contributory negligence to be submitted to the jury."

While such cases are rare, we think this plaintiff has brought himself within the exception.

The plaintiff testified "that he saw a wagon standing opposite to him, five or six railroad tracks being between him and the wagon; that he was standing next to the public road at the end of the freight depot, and saw a man on the public road crossing the track; that the wagon was going towards him; that there was a man on the wagon and one walking on the ground, and that when he saw him he had stopped. When I saw the man standing there in the wagon, I started to go across the track. I was going to speak to him and tell him that he could soon pass. Just before I started, I listened for a train and did not hear any; did not hear any whistle or bell; did not hear the approach of any engine or train on that side. I could not see the engine on the main line; there were cars on the house track between me and the main line. I had a parasol with me. When at the end of the depot, it was closed, and when I started to cross the track I opened it. I was holding it over me. It was not raining much. When I started from the end of the freight depot to cross to where the man was in the wagon, I was looking at the wagon that was over there and noticing for cars, shifting engine, and box cars. I was looking over where the shifting engine was and was watching the man to keep him from crossing. I did not want him to pass at that time; there was danger from the cars. That was part of my duties. When I started, I went across the house track, and when going in that direction I was looking at the wagon that was standing over there. When I was crossing the main line, the engine hit me on the leg. The engine was coming from towards the coal chute. I was at that time on the public crossing."

Plaintiff further testifies: "It was customary to ring the bell and blow the whistle when engines approached this crossing; it was my duty to keep the cars off the crossing. I could not do this unless I saw them; I wanted to watch the wagon and I wanted to watch the crossing. I told the man to hold on, because there was danger of cars being shifted at that time—box cars and switching engines. I was watching this engine to tell him of the danger of cars going on the crossing. I wanted to tell the man on the wagon not to drive on, because there was danger of the cars being shifted at that time. When there were cars on this side it was my duty to tell the people on the crossing and warn them of the danger into which they were going." Plaintiff further stated "that he did not know what engine struck him; that it was one on the main line, passing through the yard. That it was not the shifting engine. That the engine had not been around there before that day; that he did not know where it was going. That he did not know where it came from. That it was not making any fuss."

Upon cross-examination plaintiff states that when he crossed the house track he did not look towards the coal chute; that if he had then looked he could have seen this engine that struck him on the main line, as there was nothing to prevent after crossing the house track; that he did not look towards the coal chute because he did not hear any bell and "did not hear any sign of any train." Plaintiff gives his excuse for not looking down the main line towards coal chute: "I did not hear anything of any bell and did not hear any sign of any train. Instead of looking for a train, I was looking for that wagon. Instead of looking towards the coal chute, I was looking towards the wagon." He further says he knew the wagon was across the tracks, and that he used his hand to signal it, in order to keep it from crossing until it was safe to do so.

The evidence of plaintiff tends to prove that he was attending to his duties. At the time that he was stricken his attention was fastened upon the shifting engine, shifting cars immediately west of the crossing, and over the crossing, and to the man and wagon at that time endeavoring to cross the tracks. There was no other engine upon the yards and had not been since the regular trains had left. He had no occasion to anticipate the approach of any train or engine. The one that struck him had not been upon the yard that day. It came from the round-house and gave no signal of its approach. The plaintiff, with his attention fixed upon the shifting engine and the travelers, was taken by surprise. He listened for the approach of trains and heard no noise before starting from the shed to cross the tracks to the wagon. Being satisfied by listening that no train was approaching, he started to the wagon and at same time signaling by hand and voice to attract the driver's attention.

The plaintiff was employee of the defendant and in the actual discharge of his duties when injured. His station was at this crossing and his duties required him to be almost constantly on and near the tracks, crossing and recrossing. He is not, therefore, to be judged as a trespasser, licensee, or traveler, who has nothing to do but look and listen when they approach a railroad track.

The employee whose occupation requires his presence on and near the tracks has other duties to engage his attention. The passer-by, whose sole duty is to look and listen, is held to a greater degree of vigilance than the employee, whose attention must necessarily be diverted by his work. *Brown v. R. R.*, 144 N. C., 635; *Smith v. R. R.*, 132 N. C., 819.

The plaintiff was employed in a most dangerous work, requiring his almost constant presence on the tracks. Under such circumstances the defendant owed him the duty of active vigilance in giving warning of the approach of engines and trains and the plaintiff had the right to rely upon the performance of this duty in discharging his own duty and caring for his personal safety.

While plaintiff assumed the risks naturally incident to so dangerous an occupation, a failure to ring the bell or give other warning of the approach of trains is a risk not assumed by him. *Schultz v. R. R.,* 37 Minn., 271; *R. R. v. Henze,* 71 Mo., 636.

In *Erickson v. R. R.*, 41 Minn., 500, it is said: "Had plaintiff been employed by defendant to work on *its tracks,* there probably would have been no question raised that defendant would have owed him the duty of active vigilance," and it is held that the employee had the right to rely upon the continued performance of defendant's duty to give proper signals of the approach of trains.

It must not be assumed, however, that the plaintiff, a watchman at a crossing for the protection of passers, is relieved from all obligation to look as well as listen for approaching engines. He is under the highest obligation to do so, both for the protection of travelers as well as for his own safety. But this duty is to be considered in connection with his primary duty to warn and protect travelers approaching the crossing, and as far as his immediate duty to them will permit, the watchman must look as well as listen.

The rule is well stated by *Mr. Justice Manning* in *Farris v. R. R.,* 151 N. C., 490: "While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for the safety by the well-considered decisions of this and other courts, yet it cannot always be said that he is guilty of contributory negligence, as a matter of law, because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well."

This reasonable rule is supported by the adjudications of other States as well as text-writers, 3 Elliott on Railroads, sec. 1166 A, and cases cited, and is both humane and conservative of human life, as well as consonant with sound public policy.

Under the circumstances testified to by plaintiff, we do not think as matter of legal inference that he was necessarily guilty of contributory negligence. His Honor properly submitted the conduct of the plaintiff upon all the evidence to the judgment of the jury under "the rule of the prudent man," and substantially instructed them that it was plaintiff's duty to exercise all reasonable vigilance by looking as well as listening for approaching trains as the circumstances and his occupation and duty to the traveler permitted, and that if he failed to do so it was such contributory negligence as barred recovery.

Under the circumstances in evidence in this case we find no error in such instruction.

We do not deem it necessary to further discuss the exceptions to the charge. They are disposed of by the views expressed in this opinion.

Upon the whole record we find

No error.

JOHN WIGGINS, BY NEXT FRIEND, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 12 April, 1911.)

1. **Master and Servant—Contributory Negligence—Evidence—Negligence.**

   In an action for damages by one employed by a railroad company as a brakeman, alleged on account of his acting in obedience to instructions in getting on defendant's moving freight train: *Semble*, the evidence relied on to excuse him from contributory negligence, under the rule of the prudent man, would also exonerate the defendant from the charge of negligence.

2. **Master and Servant—Accepting Employment—Implied Knowledge.**

   By entering into a contract with a railroad company to perform the services of a brakeman on a freight train, there is an implied representation by the one thus accepting the position, nothing else appearing, that he knew the duties and how to perform them.

3. Same—Dangerous Employment—Instructing Servant—Duty of Master.

It appears from the evidence that the plaintiff accepted a position with defendant railroad company as a brakeman on one of its freight trains, and after having safely gotten on the train several times when it was moving, he was injured on the day of his employment while attempting to get on a coal car with the train moving from 4 to 6 miles an hour; that he had been instructed at the time by the conductor to get on the caboose, which, from the arrangement of the steps, door, and side bars or holds, was less dangerous; and that it was customary for brakemen to get on the train when moving at the rate of speed of this one. The negligence alleged was the failure of the defendant to instruct plaintiff in the performance of his duties: *Held*, a motion to nonsuit plaintiff upon the evidence was properly allowed, as therefrom it did not appear that plaintiff was inexperienced or that any special instruction was required.

APPEAL by plaintiff from *Lyon, J.*, at the October Term, 1910, of DURHAM.

The plaintiff sues to recover damages for personal injuries. At the conclusion of the evidence, a judgment of nonsuit was entered, and the plaintiff appealed.

The plaintiff gives the following account of his injury: "I was 21 on 6 June, 1910. I worked for the defendant on 16 February, 1910. Had been living at a colored boarding-house nine months. Have been in Durham three years. About 6:30 that morning Sol. Williamson came after me. I went with him to the cab of defendant's train. It was standing near the colored hosiery mill. When I got there I went to the cab and got some matches and made a fire, as directed by Sol. Mr. Jordan was conductor, Mr. Sumpter engineer. It was a local freight and ran to Henderson and back the same day. It left at 6:30 in the morning and was due to get back at 3:30 in the afternoon. I was to get 90 cents a trip. We left Durham with seven or eight freight cars. I was told to help unload and shift cars and to ride in the caboose. The caboose was the last car. Sol. and myself were brakemen; Sol. in the front and I in the rear. We left Durham at 7:05 that morning. When we got to a station I would help unload and shift cars. When we would leave a station, I would catch the train as it would start off, and I would wait for the caboose to come on and catch the caboose. I would catch the train as it was moving. There are eight or ten stations between Durham and Henderson. The conductor saw me when I would get on the car while it was moving. At Hesters he told me to drag back some flour, and the train was going on at the time. He told me to go in the depot and drag some flour back and I had to catch the train while it was running, after I had dragged back the flour. Defendant had handholds and footsteps to catch on. A footstep is about 1½ inches wide at the bottom and the handholds are round pieces of iron about the size of my thumb. The handhold is on the side of some cars and on the end of others. The footstep is on the bottom of the car and runs about a foot below the bottom of the car. At every station I would get out and help load and unload and shift cars. Part of the time the conductor rode in the caboose and part of the time he went across to the engine. At Henderson we were shifting cars on the yard, and the conductor told me to catch the cars and go to the top of them and tighten the brakes and keep them from hitting so hard. I caught the cars while they were running. Coming on back, I helped unload and to shift the cars. I was rear brakeman coming back and Sol. front brakeman. Sol. and I were colored. The conductor, engineer, and fireman were white. We got to Redwood, returning, about 4 o'clock. I got down off the train. Sol. cut loose the train, changed switches, and hollered for me to go up and tighten the brakes. These brakes did not go good, and the train had gone back on the main line and it coupled up and the engineer, Sumpter, hollered to me and told me to check it, and the car did not stop rolling. I chocked it on the upper end instead of the lower end. Sumpter jumped down from his engine and chocked the car and came on by me and went on to his engine and started it off. I would have caught it then, but he said something to me, I don't remember what he said. I went to the rear of the train. I got to the rear, but it was leaving so fast that before the rear got to me I thought I could not catch it, and I caught the third car from the rear, which was a coal car. There were ten or twelve cars on this train. The coal car had handholds and footsteps on it. They had one sidetrack on the east side. By chocking a car I mean taking a stick or something and putting it under the wheels to keep it from rolling. I put the chock on the upper side. At the time the engineer got on his engine the caboose car was standing on the end of Neuse River bridge. There were four or five cars between me and the caboose. The train was running about 6 or 8 miles an hour when I caught the coal car. I caught at the coal car and it threw me under the track and both cars came after and the train ran over me and dragged me at least five yards to the end of the switch and threw me out just at the switch point."

Sol. Williamson, a witness for defendant, testified as follows as to the employment of the plaintiff, who is spoken of as John: "On 16 February, 1910, I was employed by defendant as brakeman on the local freight from Durham to Henderson. Mr. Jordan sent me to get Ernest Lyon. I was going after Ernest when I saw John. I asked him had he seen Ernest, and he said he was gone to the factory, and asked what I wanted with Ernest. I said I wanted him to go out with me. John said, 'Why didn't I give him the extra work?' I said, 'I did not know you wanted to lose a job for one day's work,' and he said that it would be all right, that he would take the extra; and said, 'Come on and see what the men said about it.' John goes on back up to the club with me, and when Mr. Jordan came he asked me was that the man I got, and I said that was the only man I got, and John said he had been railroading, and Mr. Jordan asked if he had worked on the railroad. John said he had, that he worked some with the Coast Line and some with the Seaboard. Mr. Jordan said: 'If you have worked for the Coast Line, I am satisfied you can work on this railroad.' He asked John how old he was, and John said between 21 and 22. Jordan said we have got to have some one, and we went off."

Foushee & Foushee and Manning & Everett for plaintiff.
J. L. Morehead and F. L. Fuller for defendant.

ALLEN, J. There is no evidence in this case that the train was not properly equipped, and the plaintiff does not suggest that any appliance used by the defendant was defective. He rests his case upon the principle that he was an inexperienced hand, and that he was not instructed as to the manner of getting on a moving train. In order to excuse himself from the charge of contributory negligence, he says in his brief: "We submit it cannot be said as a matter of law, upon the evidence in this case, that a train moving at the rate of from 4 to 6 miles an hour, and when other train hands had caught it at the same time that plaintiff attempted to catch it, was moving so rapidly that a person of ordinary prudence would not make the attempt." If the train was "moving at the rate of from 4 to 6 miles an hour" and not so rapidly "that a person of ordinary prudence would not make the attempt" to get on the train, and the plaintiff is therefore excused from the charge of contributory negligence, it would seem that the same facts would exonerate the defendant from the charge of negligence in moving its train too rapidly from its station.

The evidence does not, in our opinion, disclose that the plaintiff was inexperienced, or that any instructions would have given him information he did not have.

It is true, he was employed by the defendant the day he was injured, but he does not say he had no experience in the work he engaged to perform, and the fact that he entered into the contract of service, nothing else appearing, was a representation that he knew his duties and how to perform them.

It also appears that he told the agent of the defendant, who employed him, that "he had been railroading" and that he had worked some for the Coast Line and the Seaboard. He testifies that he had gotten on the train, while in motion, several times before he was injured, and there is no evidence he had any difficulty in doing so. We fail to see any instruction that would have given him information he did not have.

He also testifies that the conductor told him to catch the caboose car, and that he was injured by trying to get on a coal car. The caboose had a door in the middle of the side and had two steps below the door with wooden treads about as wide as a man's hand and they came closer to the ground than the steps on a coal car, and it also had a long curved handhold on each side of the door. The coal car had only one step and a straight handhold on the end of the car. It was obviously safer to catch the caboose.

We find no error, and the judgment is

Affirmed.

W. C. WILCOX v. DURHAM AND CHARLOTTE RAILROAD COMPANY.

(Filed 12 April, 1911.)

Railroads—Discrimination—Rebates—Contracts—Tramroads.

From the uncontradicted evidence in this case it appears that plaintiff, the owner of a tramroad, bought lumber and timber from third parties to be delivered at defendant's railroad under contract with the latter that he be allowed ½ cent per 100 pounds for hauling it over the tramroad to its junction with railroad: *Held*, there being no allegation or evidence tending to show that the rate charged over plaintiff's tramroad was excessive or that the transaction was a mere device to evade the statute against rebating, or that it was a discrimination in any manner, the plaintiff's charge for the haulings was a valid one, which he could recover against the defendant railroad company.

ALLEN, J., did not sit on the hearing of this case.

APPEAL by defendant from *W. R. Allen, J.*, at Spring Term, 1910, of MOORE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

R. L. Burns for plaintiff.
Guthrie & Guthrie for defendant.

CLARK, C. J. This case was before us, 152 N. C., 362, upon a demurrer. The defendant contracted with the plaintiff that if he would build a tramroad from a certain point on its line to a point on Richlands Creek it would pay the plaintiff ½ cent per 100 pounds on all lumber or timber delivered to the defendant by said tramroad.

It does not appear in the evidence whether the ½ cent per 100 pounds was to be added to the rate from the point where the railroad received the freight, so as to allow the tramroad compensation for hauling, or whether it was to be deducted from the regular rate charged to other people from said junction point. If the latter were the case, the contract would be illegal as a rebate forbidden by law (*R. R. Discrimination Case,* 136 N. C., 479), and the plaintiff could not recover. Clark on Contracts, 336. In the former case, it would be illegal if the lumber and timber were the property of the plaintiff, for the defendant railroad could not allow him compensation for hauling his own lumber and timber.

The evidence is that the plaintiff bought said lumber and timber, but to be delivered at the defendant's road and not to the tramroad, and he contends therefore that he is entitled to the stipulated compensation of ½ cent per 100 pounds for hauling freight for his vendors. This evidence is uncontradicted, and unless it were alleged and shown that said allowance of ½ a cent per 100 pounds were excessive and that the transaction is a mere device to evade the statute against the allowance of rebates and is in truth a discrimination by which the plaintiff was to be charged a lesser rate than other shippers from the point where the defendant railroad received the freight, the contract is valid. In the absence of such allegation and proof, the presumption is in favor of the correctness of the proceedings below.

The prayer to instruct the jury upon the theory that the lumber and timber were the property of the plaintiff was properly refused, there being no evidence to support it.

No error.

JOHN C. COX v. G. H. JERNIGAN.
THOMPSON v. JERNIGAN.

(Filed 12 April, 1911.)

1. **Wills—Devise—Trusts and Trustees—Intent—Life Estate—Remainder—Intestacy—Presumptions—Rule in Shelly's Case.**
   A devise of lands in special trust that J., a grandson, be allowed the "use and enjoyment" thereof during his life, and in case he should die before attaining the age of 21 years without having living children, "then to the use and enjoyment of my living children and their heirs": *Held*, (1) a devise of the fee simple will not be presumed, Revisal, 3138; (2) J. would take a life estate, with remainder to his living children, if any, and otherwise the title would then revert to the estate of the testator; (3) the presumption is in favor of testacy, requiring no express devise to the living children of J.; (4) the rule in *Shelly's case* has no application.
2. **Life Estates—Possession—Remainder—Limitations of Actions.**
   The possession of a life tenant, however long, can confer no title against the remaindermen.

Appeal by plaintiff from *Whedbee, J.*, at February Term, 1911, of Harnett.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

N. A. Townsend for plaintiff.
J. C. Clifford for defendant.

Clark, C. J. Sanders P. Cox died seized in fee of the premises. The plaintiff, John C. Cox, having contracted to sell the premises to the defendant, tendered a deed and demanded the purchase money. The defendant refused to accept the deed and pay the purchase money, on the ground that the plaintiff could not make a good title in fee.

The plaintiff claims title under the following item in the will of Sanders P. Cox: "Item 3. I give and devise to Wiley M. Cox, Charles P. Farmer, and O. C. Darden and their heirs that tract of land (describing it) now owned by me, supposed to contain 430 acres, more or less, in special trust and confidence that they will allow my grandson, John C. Cox, the use and enjoyment of the same during his life. In case he should die before he arrives at the age of 21 years and should not leave any living children at his death, then to the use and enjoyment of all my living children and their heirs."

Upon the facts agreed, as above, the judge held that the deed offered by the plaintiff did not convey a fee-simple title to the land, and that the defect would not be cured by the surviving trustee joining therein, and gave judgment accordingly.

In *Hauser v. Craft,* 134 N. C., 319, where the Court was called upon to construe an item in a will very similar to this, it was held that where there is a devise of property to A. for life, and should A. die without leaving children, then the property to be divided among the rest of the testator's heirs, A. held a life estate, with a remainder to A.'s children, and that in such case the children would not be estopped by a deed with covenant of warranty executed by the life tenant. That case presented almost the exact counterpart of the devise in *Whitfield v. Garris,* 134 N. C., 24, where the property was devised in fee to A., with a provision that if he should die without leaving children or heirs of his body, then over. In such case it was held that A. took a fee defeasible on his dying without leaving children.

It is clear that the testator in the present case intended to devise only a life estate to the plaintiff, and hence a devise in fee simple will not be presumed under Revisal, 3138. *In re Brooks' Will,* 125 N. C., 136. The rule in *Shelly's case* has no application here. *Byrd v. Gilliam,* 121 N. C., 326; *Hooker v. Montague,* 123 N. C., 154.

The testator used apt words to indicate that he intended to give only a life estate to his grandson, and allowed him to use and occupy the land during his life. At the death of his grandson the property would vest in his children, and if he left none it would revert to the estate. There is no express devise to the children of John C. Cox should he die leaving children, but in view of the presumption in favor of testacy and under a proper construction of the testator's intention, the land by implication would descend to the children of John C. Cox.

It was also held in *Hauser v. Craft,* 134 N. C., 319, that possession by the grantees of a life tenant is not adverse to the remainderman during the life of the life tenant. *A fortiori* the possession of the life tenant, however long, can confer no title as against the remaindermen.

Affirmed.

NOTE.—*Thompson v. Jernigan* is affirmed on authority of the above case.

MRS. SARAH MORARITY v. DURHAM TRACTION COMPANY.

(Filed 12 April, 1911.)

1. **Street Railways—Alighting Passengers—Negligence—Questions for Jury—Instructions.**

   In an action for damages against a street car company for negligence alleged in suddenly starting the car while plaintiff, a woman of 58 years, seeming to the conductor to be "old and clumsy," was alighting at her destination, of which she had previously notified the conductor, from an ordinary summer car with seats running across and handholds at either end of the seats, the distance from the floor of the car to the running-board being 17 inches and from that to the ground 25 inches, the ground sloping at the place somewhat over 9 inches, an instruction is proper, that if the jury should find, under supporting and conflicting evidence, that if the car was suddenly started and jerked as the plaintiff was alighting with one foot on the running-board and the other in the act of descending to the ground, whereby the plaintiff was thrown to the ground, they should answer the issue of negligence "Yes," but otherwise if the plaintiff fell on the sloping ground after leaving the car.

2. **Street Railways—Alighting Passengers—Duty of Conductor—Rule of the Prudent Man—Negligence—Questions for Jury.**

   As to whether a street-car conductor owes a duty to assist a passenger to alight is a question for the jury, under the rule of the prudent man, with the burden of proof on plaintiff, where such assistance would seem to be required; and defendant's negligence is a question for the jury when there is evidence tending to show that plaintiff was a woman 58 years old, appeared to the conductor to be "old and clumsy," was injured while alighting from a summer car at a customary stopping point, her destination, of which she had previously notified the conductor, and where the ground sloped more than 9 inches.

3. **Negligence—Release—Agreeing Mind—Questions for Jury.**

In this case there was evidence tending to show that defendant obtained a release from plaintiff for damages in consideration of $10 and the payment of plaintiff's drug and doctor's bill, soon after the injury complained of was inflicted, while the latter was in bed suffering from the effects of the injury and under the influence of drugs: *Held*, it was a question for the jury to determine whether the plaintiff at the time of the execution of the release had sufficient mental capacity to understand its nature and effect.

APPEAL by defendant from *Lyon, J.*, at October Term, 1911, of DURHAM.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

A. M. Moore and Bryant & Brogden for plaintiff.
Foushee & Foushee for defendant.

CLARK, C. J. This is an action for injuries sustained in getting off a street car. The car was an ordinary summer car with seats running across, with handholds at either end of the seats. The evidence on both sides is that the car had come to a full stop; that the distance from the floor of the car to the running-board was 17 inches, and from the running-board to the ground was 25 inches; that the car stopped at a regular stopping place and that the ground sloped at that place something over 9 inches. The plaintiff was a female 58 years of age. Her allegation is that the car moved while she was in the act of getting off and before she had time to reach the ground, giving a sudden plunge or jerk which caused her to lose her balance and fall, whereby she sustained serious injuries. The defendant contended that the plaintiff stumbled after she left the car by reason of some inequality in the ground for which the defendant was not responsible.

The judge charged the jury that if they found from the greater weight of the evidence that when the car stopped and while the plaintiff was in the act of alighting therefrom with one foot on the running-board and the other in the act of descending to the ground, the car was suddenly started and jerked, whereby she was thrown to the ground, the defendant was guilty of negligence, and the jury should find the fourth issue "Yes." But that if the jury should find from the evidence that if the car was standing still and did not move while she was in the act of getting off the car, but that while the plaintiff was walking off from the car she stumbled and fell and hurt herself, the defendant would not be responsible for that, and the jury should answer the fourth issue "No."

While there are a good many exceptions, the above instruction states the real controversy, which is almost entirely one of fact for the jury, and the case was submitted by the judge with instructions as to the law under the well-settled principles of negligence applicable in such cases. It is unnecessary to discuss them in this case, as they have so repeatedly been decided by the Court. The defendant relies, however, much upon the following instruction by the court: "That if the jury should find by the greater weight of the evidence, the burden being upon the plaintiff, that the car was of such height and the running-board was such a distance from the ground that an ordinarily prudent man under the circumstances of the situation would not have had such a car stop at such a place, and if the jury should find that the height of the car and the distance from the running-board to the ground and place where the car stopped was in such condition that a reasonably prudent man would not have permitted the plaintiff to have gotten off the car without assistance, then it was the duty of the defendant, by its conductor, to assist her in getting off, and that if he failed to do so under the circumstances his failure was negligence, as the court has defined negligence to be." In this we find no error. There was evidence that the plaintiff was 58 years old, and on the other hand there was evidence that she had walked 3 miles that morning, tending to show that she was still vigorous. Whether in view of all the evidence a reasonably prudent man would have allowed the plaintiff, incumbered with the skirts of her sex, to get off a car of that height without assistance at a place where the ground was steeply sloping, was a matter of fact for the jury, which was properly left to them. The conductor testified that the plaintiff seemed "old and clumsy." Whether under all the circumstances it was negligence in him not to render her assistance was a matter to be determined by the jury from the evidence, using their knowledge acquired by their observation in the ordinary affairs of life. This is called "ordinary common sense," and is one of the strong points which recommends the jury system for the determination of disputed matters of fact.

The plaintiff's hip was broken and there was testimony that she was otherwise injured. The day after she was hurt and while she was in bed suffering from the injury, the defendant secured from her a release in consideration of the sum of $10 in cash, $15 in doctor's bill, and $13.65 for drug bill. The plaintiff testified that she was under the influence of drugs and suffering from pain and does not remember giving the receipt. The jury find that $1,000 was a fair compensation for her injuries. Upon all the evidence and under a correct charge from the court, the jury find upon an issue submitted that the plaintiff at the time of the execution of the said release did not have sufficient mental capacity to understand its nature and effect.

The exceptions in the case present mostly questions which have been so often passed upon by the Court that they do not require further elaboration. The chief point presented is that first discussed above, as to which Moore on Carriers, 682, says: "A railroad company having provided suitable and safe means for entering and alighting, and having stopped its train in the proper position, is under no obligation to furnish some one to aid passengers generally in getting on board or alighting from its cars. In the case of infirm persons, however, whose age and infirmity are apparent from their appearance, it is the duty of the carrier's servants to assist them in alighting from or boarding a train, if such assistance is necessary for their safety. And where a train stops at a place where passengers cannot alight without difficulty, they are bound to assist them." Again, he says: "Ordinarily, whether or not assistance should have been rendered by the carrier's employees to a passenger in a given instance is a question for the jury under the circumstances in the case."

In *R. R. v. Miller,* 11 L. R. A., 396, 23 Am. St., 315, the Court sustained the following instruction: "Whether or not the failure to assist Mrs. Miller in getting off the train on the part of the persons in charge of said train was a want of that measure of care which the employees of the defendant owed to her as a passenger, you will determine from all the circumstances, taking into consideration the failure on her part to ask for assistance." This is substantially the charge given by the court in this case. In *Hinshaw v. R. R.,* 118 N. C., 1053-1055, discussing injury to a passenger in alighting from a car, it was held that such matters should be submitted to the jury. In the present case the conductor testified that the plaintiff "seemed to be old and clumsy," the car was quite high from the ground, which was steep and sloping at that point, and she had notified the conductor of her wish to alight at that point. Whether it was negligence in him to permit her to alight without assistance and whether such negligence was one of the causes of the injury were matters properly submitted for determination by the jury.

Upon consideration of all the exceptions, we find

No error.

CHARLES D. WILDES, RECEIVER OF THE VERTICAL PAPER COMPANY, v. M. NELSON AND JAMES W. ALLEN.

(Filed 12 April, 1911.)

1. Contracts—Failure to Perform—Dependable Conditions.

A party to a contract may elect to treat it as ended upon the failure and inability of the other party to perform a dependent stipulation therein and which extends to the entire measure of the obligation.

2. **Same—Patents—Termination of Contract—Election—License.**

When it appears from a written contract entered into between a patentee and another that the purpose of the former was solely to arrange for the manufacture and sale of the patented implement, for which he was to receive a certain commission on the sales, the right of the latter under the contract is dependent upon the fulfillment of the obligations imposed upon him, and upon his failure and inability to perform these conditions the patentee may regard the contract as at an end. *Semble*, in this case, the contract was one of license and not of assignment.

3. **Contracts—Failure to Perform—Termination—Election—Corporations—Receivers.**

The receiver of an insolvent corporation can enforce no right under a contract previously entered into by the corporation and a patentee, wherein the rights of the corporation are made dependent upon the manufacture, advertisement, and sale of the patented article and payment to the patentee of a commission or royalty on the sales, when admittedly the corporation had failed to perform the conditions imposed on it and was unable to do so.

APPEAL from *Whedbee, J.*, at February Term, 1911, of WAKE.

Civil action, heard on case agreed. It was made to appear that, on 12 June, 1905, the defendant Nelson, patentee and owner of an improved paper cutter, entered into a contract with M. N. and E. M. Andrews, parties of the second part, by which the said parties acquired the exclusive right to manufacture and sell said patent and any and all improvements on the same that might be made by the party of the first part. The parties of the second part contracting "to manufacture or cause to be manufactured said paper cutter and to push sale of same." That on 4 June, 1906, the said Andrews Bros. assigned said contract to the Vertical Paper Cutter Company, a corporation, and this company acquired all the rights and interests and assumed all the obligations of the Andrews Bros. under their contract of 12 June, 1905, and this was done with the approval and assent of defendant Nelson. That, prior to 21 December, 1907, the Vertical Paper Company ceased to sell said implements; having become hopelessly insolvent, they were unable to further manufacture and furnish or sell same, and, thereupon, said Nelson elected to treat the contract as discharged and ended by the aforesaid breaches thereof by the said corporation. That on 8 January, 1908, in an action instituted by the Ohio Brass and Iron Manufacturing Company in behalf of itself and other creditors of the Vertical Paper Company, and on the ground of insolvency, Charles D. Wildes having been duly appointed receiver of the property and assets, summons was issued against said Nelson and complaint filed to establish the rights and realize on the interests of the Vertical Paper Company in the patent and as acquired under and by virtue of the contract. In reference to this demand, the case agreed further states: "That since his appointment, the receiver of said Paper Cutter Company has failed to carry out or perform any part of said contract in respect to the manufacture and sale of said paper cutters, which devolves upon said Paper Cutter Company under said contract, and is and has been unable to do so, and also was without authority to do so under the order appointing him receiver." On the contract and facts in reference thereto, stated in the case agreed, the court entered judgment that defendant Nelson go without day, and the receiver excepted and appealed.

John W. Hinsdale and Walter L. Watson for plaintiff.
E. L. Travis, W. E. Daniel, and Murray Allen for defendant.

HOKE, J., after stating the case: The cause, in our opinion, has been correctly decided. The contract, on which the rights of these parties depend, contains preamble and recitals:

"That whereas the party of the first part did obtain letters patent of the United States for an improvement in paper cutters, which letters patent are numbered 718722, and bear date of 20 January, 1903; and whereas the party of the first part is the sole owner of said patent and of all rights under same; and whereas the parties of the second part are desirous of acquiring the exclusive right to manufacture and sell said patent paper cutters, including any and all improvements that may be made in said patent by the party of the first part; and whereas the party of the first part is desirous of having the parties of the second part assume the entire control of the manufacture and sale of said patent paper cutter: Now, therefore, in consideration of the premises and the further consideration of the mutual promises and agreements hereinafter set out, and for the purpose of fully defining the rights and privileges of the parties hereto, and the payment of the sum of $10, the party of the first part and the parties of the second part do promise, agree, and contract, each with the other," etc.

And on matters more directly relevant, then stipulates as follows:

"First. The party of the first part hereby licenses and empowers the parties of the second part and their assigns the exclusive right to manufacture and sell said patent paper cutter, which not only embraces the patent paper cutter as now designed, but includes any and all improvements in or modifications of said patent that may hereafter be made by the party of the first part, in the United States of America and in all foreign states and countries, to the full end of the term for which said letters patent are or may be granted, as fully as that right is now enjoyed by the party of the first part; said parties of the second part to have the right and authority to manufacture and sell said patent paper cutter under the name and style of 'The Nelson Paper Cutter, Andrews & Andrews, Sole Manufacturers and Agents,' or under whatever name said parties of the second part may elect, either now or hereafter, with full right and privilege to change said name or style whenever they may so elect.

"Second. The parties of the second part are to manufacture or cause to be manufactured said improvement in paper cutters, and are to sell the same, using due diligence to push the sale of said paper cutter through agents and jobbers as may be deemed most advantageous by the parties of the second part, and to this end to use such advertising means as may be necessary to fully present the desirable qualities of such invention to the public. . . .

"Fourth. The parties of the second part agree to pay to the party of the first part the sum of 10 cents for each and every paper cutter sold under this agreement for cash as aforesaid and for which pay has been received, said payment to be made in cash or by New York draft at the time of rendering the statement hereinbefore mentioned, to wit, on the first day of January and July of each and every year, beginning the first day of January, 1906.

"The parties of the second part are authorized and empowered to sell said letters patent at such price as they may deem advisable; and the party of the first part is authorized and empowered to sell said letters patent for a sum not less than $10,000: *Provided,* that an option shall first be given to the other party by the party offering to sell, for thirty days, to confirm or disaffirm such sale; that if said party disaffirms such sale, then he is to, within ten days after such disaffirmance, pay to the party desiring to sell, in cash, one-half of the amount offered as purchase price—such amount offered as purchase price to be a *bona fide* offer to purchase. That in the event of a purchase by one of the parties to this contract under the provisions of this clause, all right, title, and interest of the party selling said letters patent shall vest in the party purchasing upon the payment of the purchase price, except that it shall in no manner affect the right of the party selling to demand and receive his part of the proceeds of all sales up to the date of such sale of his interest to the other party."

Construing the language, and on authority, the contract would seem to be the grant of a license and not an assignment (*Waterman v. MacKenzie,* 138 U. S., 252), and a perusal of the entire instrument affords, we think, convincing evidence that it was the desire and sole purpose of the patentee to arrange for the manufacture and sale of the implement, and that the royalty arising from the sale was the only recompense to be looked for or received by him. This is evident, not only from the preamble and the general scope and purpose of the contract, but is sustained further by the recital of the "consideration of the premises and of the mutual promises and agreements hereinafter set out," and by the provision that "the parties of the second part are to manufacture or cause to be manufactured said implement and to sell the same . . . using diligence to push the sale through agents and jobbers, etc., and to use such advertising means as may be necessary to fully present the desirable qualities of this invention to the public"; and from this it follows that the grant of the license by the party of the first part, and the provisions for the manufacture and sale of the implement by the parties of the second part, were dependent stipulations, and on failure of performance by the parties of the second part or their assigns and on the admission of their utter inability to perform further, the patentee was relieved of his obligations under the contract, and was in the proper exercise of his rights when he "elected to treat the said contract as discharged and ended by the aforesaid alleged breaches." Anson on Contracts, 1 Amer. Ed., p. 362; Paige on Contracts, sec. 1453; Clark on Contracts, p. 451. The doctrine was applied in the cases of *Telfener v. Russ,* 162 U. S., 270; *Bank v. Hagner,* 26 U. S., 455, and numerous decisions in our Court are in recognition of the principle. *Vallette v. Booth,* 131 N. C., 37; *Andrews v. Andrews,* 122 N. C., 352; *Ducker v. Cochrane,* 92 N. C., 600; *Lutz v. Thompson,* 87 N. C., 334.

In *Telfener's case, supra, Associate Justice Field* quotes with approval from the opinion in *Bank v. Hagner* on independent and dependent covenants as follows: "It is evident that the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfill his contract he must make his part of the agreement precedent, and cannot prevail against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof."

This position is not affected by the provision in the contract for a division of the proceeds in case of sale. This stipulation by correct interpretation was only existent during the life of the contract, and when it was made to appear that the contract was at an end by reason of default on the part of the claimants, a failure to perform dependent covenants which were essential and controlling, the provision in question was no longer binding. The authorities cited by appellant were chiefly cases where the instrument assailed was an executed conveyance or the covenants and promises were independent in their nature. In *McBurney v. Goodyear,* 75 Mass., 569, a case very much relied upon, it seems there was an independent consideration, sufficient to support the contract; nor was there any allegation or suggestion of default on the part of the claimant.

There is no error, and the judgment below must be affirmed.

No error.

JOHN W. SANDLIN, ADMINISTRATOR, ET AL., *v.* B. S. KEARNEY.

(Filed 12 April, 1911.)

1. **Deeds and Conveyances—Interpretation of Deeds—Security—Debt—Equitable Mortgages.**

   When the real object of a conveyance of land is to provide a security for a loan or debt, equity will regard the conveyance as a mortgage, and will look beyond the mere form of the conveyance and the words therein employed, to ascertain the true intent of the parties respecting the transaction.

2. **Same—Debtor and Creditor—Implied Promise of Repayment.**

   When one, at the request of another, purchases and pays for land for the latter, the law implies a promise on the part of the one for whom the purchase was made that he will repay the purchase price, with interest, thus establishing the relationship of creditor and debtor; and when the one thus acting for the other takes the deed to himself, equity will regard the deed as being in the nature of a mortgage to secure the money advanced by him.

3. **Same—Legal Title—Principal and Agent.**

   S., at the request of K., purchased certain lands for him, paid the purchase price and had the deed made to himself, and from the admissions in the pleadings it appears that it was done under a parol agreement that he was to convey to K. upon the repayment by the latter of the purchase price and interest. The statute of frauds was not pleaded: *Held,* (1) under the admissions in the pleadings, equity will regard the deed to S. in the nature of a mortgage to secure the repayment of the purchase price of the land; (2) the purchase of the land by K. through S. was in effect as if K. had made the purchase himself; (3) it was not necessary to the equity of K. that he should have held the legal title; (4) the effect of the transaction was governed by the agreement between S. and K. without regard to what the vendor may have understood.

4. **Deeds and Conveyances—Debtor and Creditor—Equitable Mortgage—Limitations of Actions.**

As the deed for the land to S. was in effect a mortgage to secure the repayment of the purchase price of land he had bought for K., and it appearing that K. had entered into possession of the land since the last payment on the debt, and retained the same for a sufficient length of time, under the statute of limitations, to bar the right of S.: *Held,* that S. is not entitled to recover in this action, which was brought to have the land sold in order to pay the amount advanced by him.

APPEAL from *Guion, J.,* at April Term, 1910, of FRANKLIN.

This action was brought by the plaintiffs on the theory that their intestate and ancestor, C. H. Sandlin, at the request of the defendant B. S. Kearney, who wished to own the same, but was unable to raise the money, had purchased a tract of land on 1 March, 1880, at public auction from W. A. Davis, administrator, and commissioner of the court, for the sum of $712, and received a deed therefor to himself, upon the agreement and trust that he would "reconvey" the land to Kearney when he paid the amount of Sandlin's bid at the sale, and, in the complaint, it is added, in the way of what seems to be a conclusion of fact or law, "the said B. S. Kearney agreeing to purchase the land from said Sandlin and to pay the amount of the bid, with interest." It is then alleged that Kearney took possession of the land and has been allowed to occupy it ever since the deed was made to Sandlin. There are other allegations to the effect that Kearney was related to Sandlin, and for this reason he was permitted to remain in possession of the land, but that he paid interest on the debt to Sandlin up to 1 January, 1885. Plaintiffs demand judgment for the possession of the land; that it be declared that the defendant is indebted to them in the sum of $712, with interest from 1 January, 1885; that, on default of the payment of the same, the plaintiffs be adjudged to have a lien upon the land for their claim, and that it be sold to pay the same. The defendant admits the allegations of the complaint, subject to the following explanation, namely, that the land was bought at the sale by Sandlin at the request of the defendant and for him, Sandlin agreeing to hold the title for the defendant until he should pay the amount advanced by Sandlin or the price paid by him to Davis, with 8 per cent interest from 1 March, 1880, and that defendant paid the interest to January, 1885, but has paid nothing on the debt since that time. This separate averment of the answer is admitted in plaintiffs' reply. The defendant then sets up a counterclaim, in which he alleges that in 1880 he contracted to buy from E. G. Brown, whose tenant he then was, a lot in the town of Franklinton for $1,000, to be paid in cash, but that, having only $300, he paid that amount on the purchase money and applied to C. H. Sandlin for the loan of the balance, $700, which was advanced to him by Sandlin upon the agreement that the land should be conveyed to Sandlin by E. G. Brown, the vendor, as security for the said loan by Sandlin to him, which was to bear 8 per cent interest until paid. That interest was paid to 1 January, 1885, when Sandlin took possession of the land and retained it until the time of his death, and plaintiffs have since had possession of it.

The plaintiffs, in their reply, admit these allegations of the counterclaim, but deny that C. H. Sandlin took possession of the lot in 1885 under any agreement with the defendant other than this, that Kearney, being unable, on 1 January, 1885, to pay the loan of $700 made to him, which with accumulated interest amounted to $938, surrendered possession of the lot to Sandlin, and formally abandoned his equity therein.

The jury, upon a single issue submitted to them, found that

Kearney had not "formally" abandoned his equity. Both parties pleaded the statute of limitations, in every conceivable form, and the case was heard by the court upon the pleadings and admissions of the parties, as herein set forth, and the deposition of B. F. Bullock, a witness for the defendant, whose testimony tended to sustain the plaintiffs' version of the facts, so far as they relate to the lot transaction. There was no request for the submission of any issue to the jury, except the one already mentioned, and no prayer for instructions. The court adjudged that as to the Davis tract, containing 13 acres, the relation of vendor and vendee had been established, and the possession of Kearney from 1 January, 1885, without any payment to Sandlin, did not bar the right of the plaintiffs, under the statute, to have the land sold to pay the purchase money, and a sale was thereupon ordered. As to the town lot, the court held that the transaction between the parties created the relation of mortgagor and mortgagee, and that the possession of Sandlin since 1 January, 1885, without any payment on the debt or any accounting for rents and profits, barred the defendant's recovery, under the statute, upon his counterclaim. Judgment was entered according to these rulings and for costs in the action, against the defendant, who has appealed therefrom to this Court.

F. S. Spruill and Bickett & White for plaintiffs.
W. M. Person and T. T. Hicks for defendant.

WALKER, J., after stating the case: There is a suggestion in the defendant's assignment of errors that he was entitled to have the two transactions in regard to the Davis tract and the town lot considered together, and that, when so coupled, the court should have decided that the debt secured by the deed to Sandlin for the Davis tract had been fully satisfied and discharged by the receipt of rents and profits by the plaintiff while in possession under the other deed. No connection between the two matters is shown by proof, though it is alleged in the answer that by a sale of a part of the town lot and the collection of rents, Sandlin had received enough to pay both debts. But as our decision will practically achieve the same result for the defendant, we need take no further notice of this contention, if it is in such tangible form as to permit us to do so.

In our opinion, the judge erred in holding that the relation of vendor and vendee was created between the parties by their arrangement with respect to the Davis tract. There is no point made as to the statute of frauds, and the case must be determined upon the admission of the parties. If the deed of Davis to Sandlin is to be considered, upon the facts relevant to that question, as a mortgage, then it must follow from the other facts that the statute of limitations, which is pleaded in the answer, is a bar to plaintiff's recovery. If the plaintiff's own statement, in his complaint, of the transaction does not make him a mortgagee and the defendant a mortgagor—and this we need not decide—the defendant's allegation, which he admits, surely impresses that character upon the relation of the parties.

There are no special words required to constitute a mortgage. The true test is to ascertain whether the conveyance is a security for the payment of money or the performance of any act or thing. If the transaction resolves itself into a security, whatever be its form, it is, in equity, a mortgage. "The rule which converts an absolute deed into a mortgage, in accordance with the intention of the parties that it should be held only as security, applies not only to conveyances, voluntarily made by the grantor, but also to deeds received by purchasers at judicial sales, when the purchase was made under an agreement or arrangement with the debtor that the title should be held only as security for a debt or loan, and should be defeasible on payment of the money due. Nor need the deed even be made by the debtor; it is sufficient if the debtor, who claims to occupy the position of a mortgagor with the right of redemption, has an interest, legal or equitable, in the premises, and the grantee of the legal title acquired it by the act and assent of the debtor and as security for his debt." 27 Cyc., 993. The law looks to the substance and not the phraseology. It goes behind the mere words of the parties to find their real meaning and intent, and when found, it administers their rights accordingly, and it matters not how this intent may be veiled or concealed by language. It searches for the true, and not the false, and brushes aside all impediments in the way of finding it. Chancery suffers itself to be little embarrassed with the forms which any transaction may assume, and, therefore, in whatever hand the fee may remain or however disguised may be the terms, if the real object be the taking or holding of land for the security of a loan or debt, it is, in equity, a mortgage, and, if necessary, the subsequent conduct of the parties with reference to the matter may be examined to ascertain their true intent, as the giving a note for the money or receiving part payment or interest on the same. *Campbell v. Worthington,* 6 Vermont, 448; 20 Am. and Eng. Enc. (2 Ed.), 944-949. It can make no difference, in the application of the principle, whether the deed is made directly from the vendor to the party alleged to hold as mortgagee, or by the party claiming the equity of redemption to him, or that the legal title never was in the debtor. *Carr v. Carr,* 52 N. Y., 251; *Balduff v. Griswald,* 9 Okla., 438. It all comes back to the same test, Was the deed made to secure a debt or was the land bought by one party for himself, with an agreement to sell it to another? In our case it appears that Sandlin advanced the money, at the request of Kearney, and the land was bought for the latter. His equity is, therefore, as complete as if he had bought it himself. When Kearney requested Sandlin to advance the money to him for the purpose of making the purchase, the law implied a promise by Kearney to pay back the amount so advanced, with interest, and this established the relation of debtor and creditor, as much so as if Sandlin had directly loaned the money to Kearney and delivered it to him, and the latter had, in turn, paid it to the vendor. The making of the deed by the vendor, at Kearney's instance, to Sandlin, is the same, at least in equity, as if it had been made to Kearney and he had conveyed it to Sandlin; otherwise, we would sacrifice the very substance of the transaction to its form. Suppose Sandlin had given Kearney a writing expressing the same agreement as that admitted in this case. Would it not be a mortgage? As we have it, the admission of the parties in their pleadings stand for the writing. The contract is the same, though it is not written. It must be borne in mind that Sandlin, according to the facts and not merely his contention, bought for Kearney and not for himself. He who does an act through the medium of another is, in law, considered as doing it himself, and it was, therefore, substantially a purchase by Kearney from Davis. Looking at the real transaction, we find that Kearney bought the land and Sandlin, at his request, loaned him the money to pay for it, taking the title to himself as security for its payment. These are the naked facts when stripped of mere verbiage. In the Vermont case we have cited, the distinction between a contract for a sale of land and a mortgage is sharply drawn, and it was held by that Court that as advancements were made by the party having the legal title, they became a loan, and consequently a debt against the party to whom they were made, and he was subject to suit therefor, and that in this feature of the case the deed was really a mortgage; and of like import is *Carr v. Carr, supra,* wherein it was said:

"It is well established that a deed, absolute on its face, can be shown by parol or other extrinsic evidence to have been intended as a mortgage; and that the relation of mortgagor and mortgagee being thus established, all the rights and obligations incident to that relation attach to the parties. It is not material that the conveyance should be made by the debtor or by him in whom the equity of redemption will exist. It is sufficient if the debtor and he who claims to occupy the position of mortgagor with the right of redemption has an interest, legal or equitable, in the premises, and the grantee of the legal title has and acquired such title by the act and assent of the debtor, and as a security for his debt. (*Stoddard v. Whiting,* 46 N. Y., 627.) In the case cited the plaintiff sought to redeem the premises from the defendant, who had taken the title upon paying a balance due upon a contract of purchase held by the assignor of the plaintiff, who had entered under the contract and paid a part of the purchase money before the arrangement with the defendant, who took the conveyance directly from the original vendor. But the principle of the case is decisive of this appeal. That the contract was in writing, and the vendee had made partial payment of the purchase money, and was in possession of the premises, only make the two cases to differ, circumstantially, and affect the degree rather than the character of the evidence to establish the relationship of mortgagor and mortgagee. The purchase here was by the borrower of the money from the plaintiff, and his rights as purchaser were recognized by the seller; the possession of the actual buyer followed immediately upon the purchase, and he paid a part of the purchase money at the time, and became a debtor to the plaintiff for the amount advanced by him. The circumstances are as significant and the equities as palpable as in *Stoddard v. Whiting;* and it needs no extension of the rule there adjudged to declare the conveyance to the plaintiff to have been intended as a mortgage."

That case is not distinguishable in principle from this one. It appeared there, it is true, that the seller had recognized the borrower of the money as the purchaser of the land by receiving a part of the purchase money from him, but that fact does not differentiate the cases, and was merely mentioned by the court because it happened to be one of the facts in the case. Sandlin bought for Kearney, paying the price for him, and thereby recognized him as the real purchaser. The character of the transaction must be determined, not so much by the understanding of Davis, the seller, as by the agreement between Sandlin and Kearney. Many authorities can be cited to sustain our view of the matter. 20 Am. and Eng. Enc., p. 943 *et seq.* and notes; Jones on Mortgages (6 Ed.), secs. 281 and 332; *Klock v. Walter,* 70 Ill., 416; *Robinson v. Lincoln Savings Bank,* 85 Tenn., 363; *Thacker v. Morris,* 52 W. Va., 220 (94 Am. St., 928). We are not without analogous decisions of this Court. The case of *Crudup v. Thomas,* 126 N. C., 333, is substantially like ours. There E. A. Crudup advanced the money at the request of A. D. Crudup and bought the land at a sale, taking the deed to himself. It was held that he was a mortgagee and liable to account as such. *Mfg. Co. v. Gray,* 124 N. C., 322. In *Watkins v. Williams,* 123 N. C., 170, it was held that whenever a deed is really taken as a security for a debt, it is substantially a mortgage, whatever may be the formal agreement between the parties, and, in equity, it will be treated as a mortgage, with all the rights and remedies incident thereto; and the same principle was announced in the previous case of *Robinson v. Willoughby,* 65 N. C., 520, wherein *Justice Rodman,* speaking for the Court, said: "A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. Whatever is substantially this is held to be a mortgage in a court of equity, and the debtor has a right to redeem. Coote Mort., 22; Fisher Mort., 68. It is immaterial whether the contract be in one writing or in several; *Mason v. Hearne,* 45 N. C., 88; and it is also immaterial (as between the parties) whether the agreement for redemption be in writing or oral; and such agreement may be implied from the attending circumstances. Of these principles, and of the circumstances which will cause a deed absolute on its face to be construed as a mortgage, numerous illustrations may be found in the treatises above cited, and in our own Reports. . . . In determining the question whether a transaction amounted to a mortgage, or to a defeasible purchase, it has always been considered of the greatest importance whether the vendor was a debtor to the vendee, and if he was, and if after the supposed sale he continued to be a debtor, the inference was irresistible that the transaction was a mortgage, and that he could redeem by paying the debt. (Coote Mort., 24.) Otherwise, the debtor would have parted with his land without any consideration whatever. . . . If a transaction be a mortgage in substance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem; such a case being, on grounds of equity, an exception to the maxim *'modus et conventio vincunt legem.'* . . . In addition to this, the fact that the supposed vendor continued in possession after the sale, without the demand or payment of rent, is a circumstance which, remaining unexplained, is inconsistent with the idea of an absolute sale. Taking this view of the case, Christenbury retained an equity of redemption, which at least his deed conveyed to Willoughby." *Porter v. White,* 128 N. C., 42; *Waters v. Crabtree,* 105 N. C., 394. A comparison of these decisions, and others of the same class, with the case at bar will disclose a striking similarity between them. But *Mason v. Hearne,* 45 N. C., 88, seems to be "on all-fours" with our case, the only difference being that, though the deed was absolute in form, the agreement for redemption was in writing; but this, as we have seen, makes no difference. In that case it appeared that the defendant bought a tract of land for the plaintiff from one Davis, and paid the purchase money to him, under an agreement that he would convey the land to the plaintiff when she paid the amount so advanced by him. It was held to be a mortgage, *Judge Pearson* saying that "the Court regards not the form, whenever the real intention was merely to secure the payment of money, and will, upon the ground of *the intention,* relieve against the forfeiture of conditions" and permit the party having the equity to redeem. Our case shows not only an express agreement for a redemption, which was evidently omitted from ignorance or mistake, but facts *dehors* the deed inconsistent with the idea of an absolute purchase by Sandlin, and thus it is brought within the familiar principle established in the following decisions: *Streator v. Jones,* 10 N. C., 423; *Kelly v. Bryan,* 41 N. C., 283; *Clement v. Clement,* 54 N. C., 184; *Sowell v. Barrett,* 45 N. C., 50.

We close this part of the discussion with the words of *Chief Justice Smith* in the oft-cited case of *Mulholland v. York,* 82 N. C., 510: "Can a trust attaching to land be created by a parol contract entered into between the debtor and his attorney, that the latter will buy the debtor's land at the execution sale, hold for his benefit, and reconvey on being reimbursed the money paid for it? In our opinion, a trust may be thus formed, and it will be enforced on the ground of fraud in the purchaser in obtaining the property of another under a promise to allow him to redeem, and attempting afterwards to appropriate it to his own use. The principle is illustrated in several cases in our own Reports, which will be briefly adverted to. In *Turner v. King,* 37 N. C., 132, the defendant verbally agreed with the plaintiff to buy in his lands, about to be sold under execution, and allow him to redeem on repayment of the purchase money; and this being known to the bidders, two of them desisted, and the defendant bought for $190 lands worth $450. On a bill to redeem, *Daniel, J.,* uses this language: 'The attempt of the defendant to set up an irredeemable title, after the agreement he entered into, is such a fraud as this Court will relieve against.'" The learned jurist used the word "trust" in its general sense, as every mortgagee is a trustee, first for himself to secure his debt, and then for the mortgagor.

If this deed must be considered as a mortgage, the deed for the town lot must receive the same construction. Kearney actually bought the lot himself and paid a part of the purchase money, Sandlin advancing the balance, upon an agreement of Kearney to pay it back to him. This created a debt, and the deed was a security for its payment.

Having concluded that both deeds must be regarded as mortgages, it follows that the plaintiff's cause of action is barred by the statute, Kearney, the mortgagor, having been in possession of the Davis tract since the last payment on the debt was made in January, 1885 (Revisal, secs. 391 (3) and 399), and the defendant's cause of action, alleged in his counterclaim, is likewise barred, Sandlin, the mortgagee, having held the possession of the lot since January, 1885, when the last payment on that debt was made. *Brown v. Brown,* 103 Ind., 23.

The result is that there was error in the ruling as to the Davis tract, and no error as to the town lot, and we modify the judgment accordingly and direct it to be adjudged in the Superior Court that the defendant is the absolute owner of the Davis tract and the plaintiff of the town lot.

Modified.

W. M. GUILFORD, BY HIS NEXT FRIEND, v. RECEIVERS OF THE NORFOLK AND SOUTHERN RAILWAY COMPANY.

(Filed 1 March, 1911.)

Negligence—Evidence—Instructions.

In this action for damages for personal injuries the usual and appropriate issues of negligence, contributory negligence, and the last clear chance were submitted under evidence tending to show that plaintiff, while walking on defendant's track, became unconscious, and was injured by defendant's train under circumstances in which the engineer could have seen his condition in time to have avoided the injury, and it was held that the instructions given by the court were not erroneous, under *Sawyer's case*, 145 N. C., 24, and other like cases.

APPEAL from *J. S. Adams, J.*, at December Term, 1910, of BEAUFORT.

Civil action to recover damages for injury caused by alleged negligence on the part of defendant company. The jury rendered the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant? Answer: Yes.

"2. Did the plaintiff contribute to his injury by his own negligence? Answer: Yes.

"3. Notwithstanding the negligence of the plaintiff, could defendants, by the exercise of ordinary care, have avoided the injury? Answer: Yes.

"4. What damages, if any, is plaintiff entitled to recover? Answer: $500."

Judgment on the verdict, and defendant excepted and appealed.

Ward & Grimes for plaintiff.
Small, MacLean & McMullan, for defendant.

PER CURIAM. There was evidence on the part of plaintiff tending to show that in October, 1908, plaintiff was walking along the railroad track, where pedestrians were accustomed to use the same because it shortened the distance for persons going in that direction, and becoming faint, he started off the track, sat down on the end of a cross-tie, became unconscious, and when in this condition was struck by a passing train and his arm crushed so that it had to be amputated, "from the shoulder"; that it was a bright, sunshining day, and at the point where the injury occurred the track, in the direction from which the train was approaching, was straight for 495 feet, and the plaintiff, in the position he then was, could have been seen for that distance and the injury prevented by the exercise of proper care on the part of defendant's employees in charge of the train. The evidence of the defendant tended to show that plaintiff was seen and his presence and condition noted just as the engine came around the curve, and that everything possible was then done to stop the train.

Under a charge, which is in substantial accord with our decisions, applicable to the case presented, notably *Arrowood v. R. R.,* 126 N. C., 629; *Pickett v. R. R.,* 117 N. C., 616; *Sawyer v. R. R.,* 145 N. C., 24, the jury have accepted the plaintiff's version of the occurrence, and in that view a good cause of action has been clearly established. On careful consideration we find no reversible error in the record, and the judgment of the court below must be affirmed.

No error.

JOHN D. KERR AND WIFE v. R. W. HICKS.

(Filed 15 March, 1911.)

Injunction—Damages—Cause of Action—Judgment.

Defendant was restrained from selling plaintiff's land upon plaintiff's application, and *ex mero motu,* as a precaution, the judge restrained plaintiffs from cutting and removing timber. Plaintiffs moved for damages caused by the order restraining them, and it was *Held,* that a judgment upon defendant's motion to dismiss was properly granted, as the damages sought were not recoverable.

APPEAL by plaintiff from *Whedbee, J.,* at August Term, 1910, of SAMPSON.

F. R. Cooper for plaintiff.
Faison & Wright for defendant.

PER CURIAM. This case has been before this Court four times before, and will be found reported 122 N. C., 409; 129 N. C., 141; 131 N. C., 90; 133 N. C., 175. Summons issued in October, 1891. This branch of the case was a motion of plaintiffs to have their alleged damages caused by reason of the restraining order issued against plaintiffs, when plaintiffs restrained defendant from working timber, etc., on the land in dispute, which order likewise restrained plaintiffs from making staves, tar, etc., on the land. Defendant filed the motion set out in the record, which his Honor sustained. The injunction was issued by *Judge E. T. Boykin,* 10 December, 1891, nearly nineteen years ago.

It is manifest that the plaintiffs are not entitled to recover damages as contended for by them.

The defendant was restrained from selling plaintiffs' land upon plaintiffs' application. In the meantime, and *ex mero motu* as a precaution, the judge compelled plaintiff to desist from cutting and removing timber. This was a condition upon which the injunction against defendant was continued until final hearing.

The order of the Superior Court refusing plaintiffs' motion is

Affirmed.

D. L. AREY ET AL. v. J. V. WILLIAMS.

(Filed 5 April, 1911.)

Ejectment—Defendant's Bond—Receiver—Power of Court—Supreme Court—Supersedeas Order—Practice.

Revisal, 453, requiring defendant in ejectment to give bond before putting in a defense to the entire action, does not abridge the power of the court to appoint a receiver to secure the rents and profits; and while the Supreme Court, under its general power of "supervision and control over the proceedings of the Superior Court," might exercise the extraordinary right to grant a *supersedeas* to vacate an order appointing a receiver and permit defendant to give bond, it will not do so except under unusual circumstances, as when there has been a gross abuse of discretion by the trial judge.

APPEAL by defendant from *Justice, J.* From WASHINGTON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Linn & Linn and W. M. Bond for plaintiff.
O. O. Gaylord for defendant.

PER CURIAM. Revisal, 453, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. *Kron v. Dennis*, 90 N. C., 327; *Durant v. Crowell*, 97 N. C., 374.

In the present case the insolvency of the defendant was admitted, and for that reason and on account of other matters made to appear to the court, the judge, instead of accepting a bond, appointed a receiver to take charge of the property pending the litigation. This is an application by the defendant to this Court for a *supersedeas* to vacate the order of the judge appointing the receiver and to permit the defendant to give bond. Under the general power conferred upon this Court of "general supervision and control over the proceedings of the inferior courts," we might exercise this extraordinary duty in a proper case, but certainly would not do so except under unusual circumstances and when there has been a gross abuse of discretion on the part of the judge below. Such is not the case here, and upon looking into the affidavits, if the matter were before us for review upon appeal, in the ordinary course, we should affirm his action.

Motion denied.

STATE v. HEZEKIAH GRIFFIN.

(Filed 22 February, 1911.)

1. **Legislature—Contracts—Promise to Work—Advances—Intent—Fraud.**

   To convict under Revisal, sec. 3431, for obtaining money upon and by color of any promise to begin any work and unlawfully and willfully failing to commence or complete the work according to the contract, without lawful excuse, it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction.

2. **Same—Rational Connection.**

   For a presumption from the evidence, created by a legislative enactment, to be valid there must be some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another fact shall not be so unreasonable as to be a purely arbitrary mandate. U. S. Constitution, Fourteenth Amendment.

3. **Same—"Due Process"—Imprisonment for Debt—Peonage.**

   In order for a conviction under Revisal, sec. 3431, it is necessary to show a contemporaneous fraudulent intent and purpose to obtain money under a promise to commence and complete certain work.

4. **Same—Interpretation of Statutes—Constitutional Law.**

   A statute which makes the mere failure to do the work or perform the contract presumptive evidence of fraudulent intent, upon which a person may be convicted and imprisoned, is violative of the Thirteenth Amendment to the Federal Constitution, and is in conflict with our own State Constitution prohibiting imprisonment for debt except in case of fraud.

APPEAL by defendant from *W. J. Adams, J.*, at August Term, 1909, of UNION.

Indictment under Revisal, sec. 2431. The defendant was convicted and sentenced to thirty days on the roads and to pay the costs. From this judgment he appeals to the Supreme Court.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

Attorney-General and George L. Jones for State.
Williams, Lemmond & Love for defendant.

BROWN, J. The offense of which the defendant was convicted is defined by the statute as follows: "If any person with intent to cheat and defraud another shall obtain any money, etc., from any other person or corporation, upon and by color of any promise or agreement that the person making the same will begin any work, etc., and shall unlawfully and willfully fail to commence or complete said work according to the contract, without a lawful excuse, he shall be guilty of a misdemeanor," etc. This statute was under consideration by this Court in *S. v. Norman,* 110 N. C., 488. In that case the trial judge charged the jury as follows: "In order to convict, the State must show to the full satisfaction of the jury something more than obtaining the advances, a promise to work to pay for the same, and a breach of that promise. Nothing else being shown, these facts would constitute only a breach of contract, and for this the defendant could not be prosecuted criminally. The jury must be fully satisfied of an element of fraud in this transaction. If the jury believe, from the evidence, that the defendant obtained these advances and promised to commence work on Monday morning to pay therefor, and at the time he obtained the advances and made the promise intended to keep his word and commence work, and afterwards, being attracted by higher wages, or for other cause, failed to do so, he would not be guilty. But if the jury are fully satisfied that at the time he obtained the advances and made the promise (if he did make it) the defendant did not intend to commence work, but used the promise as an artifice or fraud for the sole purpose of obtaining the advancements, then he would be guilty. The jury must be satisfied that the defendant's object and purpose was to cheat and defraud."

This construction of the statute was adopted by this Court in the words quoted, and the Court further said: "Certainly, evidence merely of the agreement to work and obtaining advances thereon and the failure to comply would not warrant or support a verdict." It is manifest from the record in this case that there is no evidence whatever that when the defendant obtained the advances in money he then intended to defraud the prosecutor, that he then had no intention of performing his contract, and used the promise to work as a fraudulent device to obtain the credit. The defendant was a tenant of the prosecutor, and lived with his wife and children on prosecutor's land. He was convicted of assault and battery and prosecutor paid his fine and costs, the defendant agreeing to continue work on the farm and to cut cross-ties at 10 cents each. This was in August, 1908. The defendant worked with prosecutor off and on until the last of December. The prosecutor seized his hog, farming tools, flour and meat for his debt, although he had no mortgage on them. The defendant moved off his land in order, as defendant testifies, to support his family.

But it is contended that the statute has been amended since the opinion in the *Norman case,* and that the mere fact of a failure to do the work raises a presumption of fraud, and that the original promise was a subterfuge and device to obtain the advances.

The statute was amended in 1905, since that decision, and the amendment reads as follows: "And evidence of such promise or agreement to work, the obtaining of such advances thereon and the failure to comply with such promise or agreement shall be presumptive evidence of the intent to cheat and defraud at the time of obtaining such advances and making such promise or agreement, subject to be rebutted by other testimony which may be introduced by the defendant."

The question was not discussed in the briefs or at the bar, but we must take notice of the inherent defect of this attempted rule of evidence.

The Supreme Court of the United States has frequently recognized the general power of the State Legislature to prescribe the evidence which shall be received and the effect of that evidence in its own courts. *Fong Que Ting v. U. S.,* 149 U. S., 749. But there is one element absolutely essential to the validity of a legislative presumption in order that it may not be obnoxious to the Fourteenth Amendment, the "due process" clause of the Federal Constitution. There must be some *rational connection* between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another fact shall not be so unreasonable as to be a purely arbitrary mandate. *Mobile R. R. v. Turnipseed,* Supreme Court of U. S., 19 December, 1910.

It is a part of the organic law of this State that there shall be no imprisonment for debt except in case of fraud. The bald fact that a person contracted a debt and promised to pay it in work, standing alone, does not justify a presumption of fraud in contracting the original debt, any more than it would if he had promised to pay it in money. It is beyond the power of the Legislature to create such a rule of evidence and enforce it in the State's own courts. It is but an arbitrary mandate, there being no rational connection, tending to prove fraud, between the fact proved and the ultimate fact presumed. Such an arbitrary rule of evidence takes away from the defendant his constitutional rights and interferes with his guaranteed equality before the law, and, as the Supreme Court of the United States says, "violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law." *Bailey v. State of Alabama*, Supreme Court of United States, 3 January, 1911.

Mr. Justice Hughes, who delivered the opinion of the Court, further says: "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution and subject the accused to conviction for conduct which it is powerless to proscribe."

The General Assembly of this State can no more, by the enactment of an arbitrary rule of evidence, violate the provision of our own Constitution than it can the Federal Constitution. In the enactment of the Amendment Act of 1905 it violated both.

The history of this legislation seems to have been almost identical in this State and Alabama. At first the statute construed by this Court in the *Norman case, supra,* was enacted in both States. Convictions could not be easily obtained because of the inability to prove the original fraudulent intent and purpose in obtaining the advances and making the promise. To obviate this, the amendment of 1905 was enacted in both this State and Alabama.

The Supreme Court of the United States has recently declared the Alabama amendment as violative of the Fourteenth Amendment to the Federal Constitution, and concludes its opinion in these words: "What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson v. Mayor,* 92 U. S., 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid—an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor, upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud, but merely upon evidence of failure to work out their debts. The act of Congress deprives of effect all legislative measures of any State through which directly or indirectly the prohibited thing, to wit, compulsory service to secure the payment of a debt, may be established or maintained; and we conclude that section 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received, *prima facie* evidence of the commission of the crime which the section defines, is in conflict with the Thirteenth Amendment and the legislation authorized by that amendment, and is therefore invalid." *Bailey v. Alabama, supra.* As the amendment to our statute is identical with the Alabama law, this decision is binding upon us.

Upon the evidence introduced, ignoring the statutory presumption, his Honor should have instructed the jury, as prayed by the defendant, that the evidence was insufficient to convict.

New trial.

STATE v. J. D. PERRY.

(Filed 1 March, 1911.)

1. **Lottery—Greater Value—Definition—Chance.**
   A lottery prohibited by law is a kind of gaming contract by which, for a consideration, one may by favor of the lot obtain something in return of a value superior to the amount or value of that which he risks.

2. **Same—Chance—Hazard.**
   Chance is an essential element of a lottery, whether that chance be as to any return or merely as to the amount or value of the return; and where there is a hazard in which sums are ventured upon the chance of obtaining a greater value, the scheme partakes of a lottery—that is, something gained or won by lot.

3. Same—Evidence.

It appears that the defendant in this case, indicted for conducting a lottery, had formed a club of fifty members, each of whom entered into an agreement with defendant and paid in their money from time to time, with the hope and expectation that they would be so fortunate or lucky as to win by lot a suit of clothes worth a sum greatly in excess of the amount paid by him. After their thirteenth drawing, every member who was not lucky enough to draw a prize sooner, was immediately entitled to a suit, if he had paid as agreed, but in the event of default in any two of these payments, consecutively, it was optional with the defendant to cancel the certificate of membership: *Held*, (1) the plan or scheme was a lottery within the meaning of the statute; (2) the certificate of membership was competent evidence to show the nature and form of the transaction in order to determine as to its legality.

APPEAL from *Ferguson, J.*, at February Term, 1911, of CRAVEN.

The defendant was indicted for conducting a lottery. He, with the other members of the Perry-Owens Shoe Company, organized the Perry-Owens Suit Club, which engaged in the business of selling clothing under the following plan, as shown by the certificate given to each member of the club:

"Perry-Owens Shoe Company's Suit Club shall consist of fifty (50) members. In consideration of each member paying into the general fund the sum of two dollars ($2) weekly for twelve weeks, and one dollar ($1) the week following, or less as explained below, each and every member shall be then entitled to and shall receive from us a twenty-five dollar ($25) tailor-made suit or overcoat. Each and every Friday evening at 8 o'clock there shall be held at our store a drawing, and the member whose name is drawn at that time shall be entitled to his suit or overcoat immediately. After the thirteenth drawing every member having made all payments shall be entitled to his suit or overcoat immediately. Members' certificates are transferable; but upon the failure of any member to make his payments for two consecutive weeks, the permanent cancellation of this certificate shall be optional with us."

Under this arrangement each member received a suit of clothes worth the full sum of $25, and there was no chance for any member to lose anything. Twelve of the fifty members received suits for less than $25. No tickets were issued, and nothing was paid by any member for a chance. All sums paid in were credited to the several accounts, and there was a fixed maturity value. Under this arrangement the Perry-Owens Shoe Company received for each suit an average price of $22.12. Twelve suits were sold for $156, or $144 less than the selling price.

There was evidence tending to show that the defendant actually conducted the business according to the plan set out in the certificate, and that several of the members received suits of clothes at much less than their value or their regular selling price, and the others paid full value for them. The defendant was convicted, and appealed.

Attorney-General Bickett and G. L. Jones for the State.
W. D. McIver and M. H. Allen for defendant.

WALKER, J., after stating the facts: The only question in the case is whether the selling of the clothes according to the plan or device, which we have described, constituted a lottery, for our statute upon the subject provides, among other things, that any person who shall open, promote, or carry on a lottery, by whatever name or style the same may be called or known, or who, by such ways and means, shall expose or set to sale any goods or chattels or any other thing of value, shall be guilty of a misdemeanor. Lotteries are a species of gaming. They were formerly permitted in some of the States, and even established and licensed by law, as a means of raising money for worthy objects; but their evils were so widespread, both in the woes inflicted on the weak-minded and credulous, who were induced to buy chances in them, to be followed by bitter disappointment, and in their baneful influence on those, termed lucky, who drew prizes, that, later, under the influence of a healthier public sentiment, they were generally forbidden. Bishop on Statutory Crimes (2 Ed.), sec. 951, where also we find a lottery defined as a scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine. In our case, the prospect of securing nothing is wanting, but this makes the scheme the more enticing. A definition which also has been generally accepted and which fits the facts disclosed in the record, is this: A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain something in return of a value superior to the amount or value of that which he risks. *U. S. v. Olney,* 1 Abbott (U. S.), 275 (*s. c.,* 27 Fed. Cases, No. 15,918); Bishop on Stat. Crimes (2 Ed.), sec. 952 and note 2. In *Hull v. Ruggles,* 56 N. Y., 424, the Court adopts the following as the result of the approved definitions: "'Where a *pecuniary consideration is paid,* and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery.' This definition is approved in *Wilkinson v. Gill,* 74 N. Y., 63; 30 Amer. Rep., 264, as the popular meaning of the word, and one proper to be adopted with a view of remedying the mischief intended to be prevented by the statutes prohibiting lotteries; and it is said: 'Every lottery has the characteristics of a wager or bet, although every bet is not a lottery.'" *Yellow-Stone Kit v. The State,* 88 Ala., 199. See, also, *Hudelson v. State,* 94 Ind., 426; *S. v. Mumford,* 73 Mo., 647; *Meyer v. State,* 112 Ga., 20; McLain's Cr. Law, sec. 1315; 25 Cyc., 1633; 5 Words and Phrases, 4245. In *Reg. v. Harris,* 10 Cox's Cr. Cases, 352, it is said not to be material whether the full value of the shilling, which it appeared in that case was paid by the subscribers, was or was not received by them, as in either event the scheme would come within the mischief of the acts prohibiting lotteries, inasmuch as they were induced to part with their money in the hope of obtaining, not only their alleged shilling's worth, but something of much greater value, the right to which was to be decided by chance. It will be seen by examination of the authorities that chance is an essential element of a lottery, whether that chance be as to any return or merely as to the amount or value of the return; and as thus considered, where there is a hazard in which sums are ventured upon the chance of obtaining a greater value, the scheme partakes of the nature of a lottery—that is, something gained or won by lot. 5 Words and Phrases, pp. 4245 and 4246, where many cases are collected. The definition of the term "lottery," given above, has been approved by this Court. *S. v. Lumsden,* 89 N. C., 572.

In *Winston v. Beeson,* 135 N. C., 271, we had occasion to refer to this subject, and it was said that the word "lottery" had been variously defined, and, among other definitions, as a game of hazard, in which small sums are ventured for the chance of obtaining a larger value in money or other things; or a gaming contract by which, for a valuable consideration, one may by favor of the lot receive in return something of superior value to that which he risks, citing *S. v. Mumford,* 73 Mo., 659 (39 Am. Rep., 532); *S. v. Clark,* 3 N. H., 334 (66 Am. Dec., 723). By the turn of the wheel or some other like device, patrons of this defendant received a good return for a comparatively small outlay, the right to which was determined, not by skill or any legitimate effort, but by luck or chance. It is gambling, pure and simple, and has fallen under the ban of an enlightened public opinion and is condemned by the law. A case presenting facts like those under consideration has not been before this Court, but in some of the other States, having statutes prohibiting lotteries similar to ours, the courts have held that the scheme, as devised and executed by the defendant and his associates in business, is a lottery. It appeared in *S. v. Moren,* 48 Minn., 555, that clubs of forty persons each were formed by a merchant tailor for the disposition of suits of clothing, each of the stipulated value of $40, by lot, under nominal contracts of purchase, the price to be paid in weekly installments of $1 each, such payments entitling the holders of tickets to participate in weekly drawings by lot, with the chance of securing goods of the value of $40 at any drawing, without further additional payments than the weekly installments then paid. That case, and others which we will presently cite, were in all essential features like the one at the bar. *People v. McPhee,* 139 Mich., 687; *De Floran v. State,* 121

Ga., 593; *Grant v. State,* 54 Tex. Cr. Rep., 403. It was further held that a provision in the contract that each member of the club should eventually receive a suit of clothes, when he should have paid $40, if not previously drawn, or that he might withdraw at any time and take out the value of money paid in on the contract in merchandise, does not make the scheme any less a lottery or convert it into an innocent enterprise, and thereby take it out of the operation of the statute. In our case, it appears that the members of the club entered into the agreement and paid their money from time to time, with the hope or expectation that they would be so fortunate or lucky as to win by lot a suit of clothes worth $25 for a small amount paid by them. It is true that in the case just cited from Minnesota, the Court construed a statute of that State, but the definition of a lottery as given in that statute is, in substance, but the definition of the law which has general application, and the other cases cited were decided upon the generally accepted definition of a lottery. In 25 Cyc., 1639, we find it stated that, "Suit clubs, the members of which pay weekly dues and have weekly drawings for suits, the unsuccessful members being entitled to receive a suit eventually, after the payment of a stipulated amount, or to withdraw and take out in trade the installments which they have paid, are lottery schemes."

Applying the principle, as we find it settled by the authorities, to the facts of this case, it cannot well be doubted that each member of the Perry-Owens Suit Club invested $2 at each weekly drawing upon the chance or venture that if luck favored him he would win a suit of clothes worth $25 by the expenditure of a much less sum of money. This was in form and effect a forbidden transaction and a lottery, as much so as if a suit of clothes had been won by "the throw of the dice" or any other method of gambling. If you call it a gift enterprise, it is still within the words and meaning of the statute (Rev., sec. 3726), as there is involved the element of chance that is sufficient to condemn it, even if called by that name, the statute prohibiting the distribution of gifts or prizes in such a way upon tickets or certificates. *Winston v. Beeson, supra.* The objection to the introduction of one of the certificates of membership was properly overruled. The evidence was competent to show the form and nature of the transaction in order to determine as to its legality.

No error.

STATE v. NELSON HOPKINS.

(Filed 1 March, 1911.)

1. **Jurors—Cause Pending—Disqualification—Interpretation of Statutes.**

   The reason why those having causes pending and at issue are disqualified to serve as jurors is that they should not, under the circumstances, be permitted to serve in close relationship to other jurors who may be called upon to try their cases, and this disqualification does not apply when the cause is pending and at issue, but not to be tried at that particular term of the court.

2. **Spirituous Liquors—Sale—Evidence—Declarations—Competency—Ex parte.**

   Upon a trial for unlawfully selling whiskey, there was evidence tending to show a conversation overheard at the time of the alleged sale by the witness, a policeman, between the defendant and one S., whom the witness had employed to buy the whiskey with a dollar marked for identification: *Held*, competent as tending to prove the guilt of the accused by his own declarations; but that it was incompetent for the defendant to show later declarations of S. as to what occurred during the conversation testified to, in corroboration of defendant's testimony that he gave S. the whiskey for his sick wife and only changed the dollar for him.

3. **Spirituous Liquors—Procuring Sale—Police Officers—Evidence—"Connivance."**

   In this case, the methods employed by the policeman to obtain conviction of the defendant for unlawfully selling the whiskey, *Held* not to affect the judgment. *S. v. Smith*, 152 N. C., 798, cited and approved.

APPEAL from *Ward, J.*, at December Term, 1910, of PITT.

Indictment for selling liquor. The defendant was convicted and sentenced to the roads. From the judgment he appeals.

The facts are sufficiently stated in the opinion of *Mr. Justice Brown.*

Attorney-General and George L. Jones for the State.
F. G. James and Harry Skinner for defendant.

BROWN, J. In selecting the jury, the defendant challenged one C. T. Mumford for having a case pending and at issue before the Superior Court of Pitt County on the civil-issue docket. The court refused to allow this challenge for cause, for the reason that the juror did not have a case pending and at issue at this special December term of criminal court.

The ruling of his Honor was correct. The object of the statute, Revisal, sec. 1960, is to disqualify one to serve as a juror who has a suit to be tried at the same term at which his case is to be tried. Those who have suits to be tried at the same term should not be permitted to serve in close relationship to other jurors. If the cause is not at issue at said term the reason ceases. *S. v. Spivey,* 132 N. C., 989.

The State introduced one Clark, a policeman, who testified that he procured one Streeter to go to defendant's house to purchase whiskey and gave him a marked dollar bill to pay for it, and went with him. The State permitted Clark to testify to the conversation between Streeter and the defendant to which defendant excepts.

Such evidence does not constitute the *ex parte* declaration of Streeter, as contended, but it is competent because it is a conversation of the defendant with Streeter and tends to prove the guilt of the accused by his own declarations. The evidence tends to prove that Streeter purchased a pint of whiskey from the defendant and paid for it with the marked dollar bill.

The defendant offered in evidence Streeter's later declarations as to what occurred at the conversation testified to by Clark, for purpose of contradicting Clark and corroborating defendant's own evidence, that he gave Streeter the whiskey for his wife and only changed the dollar bill, which was found immediately thereafter in his possession.

We fail to see upon what principle of evidence the defendant bases his contention that the declarations of himself or of Streeter made subsequent to the sale are competent. Certainly, the State offered no testimony of this character. Its entire testimony related to the facts constituting the sale, the things the witness saw and heard between the parties, the vendor and the vendee, at the time of the sale. If the defendant desired the benefit of Streeter's declarations he should have introduced him as a witness.

We have examined the charge and find it a fair and full presentation of the case, giving the defendant the benefit of any reasonable doubt the jurors might entertain.

The methods adopted by the policeman to catch the defendant in the act of violating the law have been criticised; but it must be remembered that the ways of "blockaders" are devious and their trade is generally plied "underground." However much the defendant, when caught, may criticise the methods used to catch him, it has been held that the transaction is, so far as defendant is concerned, a violation of law, if the evidence is deemed by the jury sufficient proof of the facts.

This subject is fully discussed in *S. v. Smith,* 152 N. C., 798, and the authorities are there collected.

No error.

STATE v. TILDEN CHERRY, J. M. RUFFIN, AND WALTER GILLAM.

(Filed 1 March, 1911.)

1. **Trials—Right of Accused.**

   In every criminal prosecution the defendant has the constitutional right to be informed of the accusation against him and to confront his accusers and their witnesses.

2. **Same—Absence—Waiver.**

   In felonies less than capital and in misdemeanors the defendant has the right to be present at the trial; but this right may be voluntarily waived by him, the limitation being that in the case of felonies this waiver may not be made by his counsel unless he expressly authorizes them so to do.

3. Same.

When the defendant is tried for a felony less than a capital one, and voluntarily absents himself, and especially when he has fled the court, his conduct may be construed as a waiver, wherein his presence is not essential to a valid trial and conviction.

4. Same—Corporal Punishment—Sentence.

When the accused is sentenced by the court to work on the roads, it involves and includes corporal punishment, and in such instances it is essential for him to be present for the sentence to be valid.

5. Same—Sentence Invalid—Procedure.

When a valid trial of the accused has been had in his absence, he having waived his right to be present at the trial by having fled the court, and a sentence has been erroneously passed on him in his absence, the judgment of the trial court will be set aside and the cause remanded with direction that a lawful sentence be imposed; the defendant being in custody of the court pending the appeal, and the appeal being regularly presented. The case of *S. v. Keebler*, 145 N. C., 560, cited and distinguished.

APPEAL from *Ferguson, J.*, at September Term, 1910, of BERTIE.

The case on appeal states the facts as follows: "This was an indictment for larceny, tried before his Honor, *Garland S. Ferguson,* and a jury, at Bertie Superior Court, September Term, 1910. The only point involved in this appeal is the exception to the judgment of the court, who sentenced the defendants Tilden Cherry and J. M. Ruffin to the roads for twelve months in their absence from the court. The defendants Cherry and Ruffin were under bond for their appearance at the term and attended the trial until the argument commenced. The court adjourned for the day. At the morning session of the court, the next day, it was reported to the court that the defendants Cherry and Ruffin were not in court and had fled the county. The court found as a fact that the defendants voluntarily absented themselves, and proceeded with the trial, and counsel for these defendants addressed the jury, knowing that they were absent. The jury, in the absence of the two defendants, returned a verdict of guilty. Counsel for said defendants did not object to the rendering of the verdict in the absence of their clients. The court then, in the absence of defendants, had them called out and a judgment *nisi* entered and their bonds forfeited, and ordered a *capias* to issue and also sentenced them to a term of twelve months on the roads. Counsel for the defendants did not object to the judgment and sentence. The two defendants Cherry and Ruffin were, after the adjournment of the court, apprehended and put to hard labor on the roads.

"From this judgment and sentence in their absence the defendants Cherry and Ruffin appeal to the Supreme Court."

Attorney-General and George L. Jones for the State.
Winston & Matthews for defendants.

HOKE, J. It is the law of this State, a principle having prominent place in our Declaration of Rights, that in every criminal prosecution the defendant has the right to be informed of the accusation against him and to confront his accusers and their witnesses. Applying the principle, this Court has held in several cases that in capital trials this right to be present in the court below cannot be waived, but that the presence of the prisoner is essential at all stages of the trial. In felonies less than capital and in misdemeanors the same right to be present exists, but may be voluntarily waived by the accused, a limitation being that in the case of felonies certainly this waiver may not be made by counsel unless expressly authorized thereto. *S. v. Jenkins,* 84 N. C., 812. The decisions are also to the effect that when the accused voluntarily absents himself, and more especially when he has fled the court, such conduct may be considered and construed as a waiver, and in that event the presence of the accused is not regarded as essential to a valid trial and conviction. *S. v. Pierce,* 123 N. C., 745; *S. v. Kelly,* 97 N. C., 404; *S. v. Paylor,* 89 N. C., 540; Clark's Criminal Procedure, p. 423.

Speaking to this question in *Kelly's case, supra, Merrimon, J.,* delivering the opinion of the Court, said: "While it is settled in this State that the prisoner has the right to be so present during his trial upon a charge for a felonious offense not capital, there is neither principle nor statute nor judicial precedent that makes it essential that he shall be. Nor in our judgment is there any common principle of justice essential to the security of personal right, safety, or liberty that so requires." And further in the same opinion: "A party charged with a felony less than capital has the right to give bail and be at large unless at the trial the court shall order him into close custody. In such case, if defendant flee, pending the trial, the court is not bound to stop the trial and discharge the jury and then give the defendant a new trial. To do so would compromise the dignity of the court, trifle with the administration of justice, and encourage guilty parties to escape, etc." While our decisions have established that in case of waiver the presence of the accused is not necessary to a valid trial and conviction, all of the authorities here and elsewhere, so far as we have examined, are to the effect that when a sentence, either in felonies less than capital or in misdemeanors, involves and includes corporal punishment, the presence of the accused is essential. Thus, in *S. v. Paylor, supra, Ashe, J.,* delivering the opinion, said: "But where the punishment is corporal the prisoner must be present, as was held in *Rex v. Duke,* Holt, 399, where the prisoner was convicted of perjury, *Holt, C. J.,* saying: 'Judgment cannot be given against any man in his absence for corporal punishment; he must be present when it is done.'" On authority, therefore, while the trial and conviction of these defendants may very well be sustained, their sentence when absent, involving as it does their corporal punishment, must be declared invalid. *S. v. Dolan,* 58 W. Va., 263, with a learned note in 6 A. and E. Cases, 450.

This conclusion, however, does not require that the entire proceedings should be disregarded and a new trial ordered. In this and similar cases the accepted ruling is that the judgment be set aside and the cause remanded with directions that a lawful sentence be imposed. *S. v. Black,* 150 N. C., 866; *S. v. Lawrence,* 81 N. C., 522; *Cole v. State,* 10 Ark., 318; *Kelly v. State,* 11 Miss., 518.

It may be well to note that the disposition we make of this appeal in no way trenches upon the principle prevailing with us, that when "pending an appeal a convicted defendant breaks jail and flees the jurisdiction of the court, such conduct may be construed and considered an abandonment of his appeal." *S. v. Keebler,* 145 N. C., 650. In this case appellants are both in custody and their appeal is being regularly prosecuted.

For the reasons heretofore given, the judgment will be set aside and the cause remanded, to the end that sentence be lawfully imposed.

Error.

STATE v. GEORGE W. EUBANKS.

(Filed 8 March, 1911.)

1. **Cities and Towns—Fire Department—Building and Repairing—Permit—Interpretation of Statutes.**
   The chief of a fire department, who is also the inspector, in incorporated towns of one thousand inhabitants or more, is authorized to issue a permit to the owner of property to build or to repair buildings thereon. Revisal, secs. 2986, 3010.

2. **Same—Ordinance—Conflicting Requirements.**
   When an owner of property in an incorporated town of one thousand or more inhabitants has obtained from the chief of the fire department, or inspector, of that town a permit to repair a building on his property, in accordance with the provisions of Revisal, 2986, 3010, he is not subject to indictment for violating an ordinance of the town in not first getting a permit to repair from the board of aldermen of the town; for the town cannot by ordinance make an act illegal which is legal under our statutes. *Quere:* If there is no conflict between the ordinance and the statute, does *S. v. Tenant,* 110 N. C., 609, apply?

APPEAL from *Ward, J.,* at September Term, 1910, of CRAVEN.

The defendant was tried before the mayor of the city of New Bern upon a warrant charging the violation of Ordinance 168, which is as follows:

"SEC. 168. That it shall be unlawful for any person to erect or build in the said fire district any building or construction composed of wood or built out of lumber. That it shall be unlawful in the said fire district for any person to add to or repair any building already erected in the said district without permission of the board of aldermen, which shall be granted only upon a hearing after a report thereupon in writing to the next meeting of the board of aldermen. That it shall be unlawful for any person to begin to erect or repair any building or construction above referred to, continue the building, erection, or repair of any such building which has, may, or shall have been commenced or begun now or hereafter. That any violation of any of the provisions of this ordinance shall subject the owner of the land, the tenant thereof, and each person engaged in such work, to a fine of $50 or to imprisonment for thirty days, and each day's continuance thereof shall be constituted and held to be a separate offense."

From the judgment of the mayor, defendant appealed to the Superior Court, and there the jury returned the following special verdict:

"We, the jury impaneled to try the above-named defendant for the charge and offense as contained in the warrant issued by McCarthy, mayor of the city of New Bern, on appeal by said defendant to this court, for repairing a certain building within the fire district of the city of New Bern without first having obtained the consent of the board of aldermen of the said city, do, upon all the evidence before us, find the following facts:

"1. We find that the said city of New Bern passed and adopted an ordinance establishing and defining fire limits within the said city, which included the principal business portions of the said city, and included a certain frame or wooden building owned by the defendant within said fire limits as aforesaid. Said city being a municipal corporation duly incorporated by virtue of the Private Laws 1899, ch. 82, as amended by chapter 61, Private Laws, Session of 1907, ratified 12 February, 1907.

"2. We find that the said building, prior to the warrant so issued, was damaged by fire, and the roof and rafters thereon burned, rendering the same unfit for occupancy.

"3. We find that the Insurance Commissioner of the State of North Carolina, in accordance with chapter 506, sec. 35, Laws of 1905, sent copies of the said subchapter to the mayor and chief of the fire department of the said city of New Bern, as required by section 3011 of the Revisal of 1905, and said city did not, on or before the first day of July, 1905, by resolution, exempt such city from the operations of said subchapter, and said Insurance Commissioner caused a certified copy of said subchapter to be mailed to the said mayor or chief of police of said city within thirty days after the ratification of the said act, as required therein.

"4. That on the .... day of ...., 19.., the said city of New Bern, through its board of aldermen, in session duly and regularly assembled, passed and adopted the ordinance duly published, as required by law, in words and figures hereto attached.

"5. That there is and was at the time of the offense charged in said warrant a regularly elected (by the fire department of the city of New Bern under the charter of such fire companies) chief of the fire department of the said city of New Bern, and that the said city did not appoint a local inspector of buildings in said city.

"6. We find that prior to the commission of the offense charged in the warrant, that the defendant, before beginning to make repairs to said building or cause any work to be done thereon, made application for and obtained from the chief of the said fire department of said city a permit and license therefor, in the words and figures hereto attached.

"7. We find that after the date of the issue of the said license or permit the said defendant, through his agents, servants, and employees, began to repair said building, and to place thereon the repairs and materials as allowed by the license or permit so issued to him, as aforesaid, without having applied to or obtained the consent of the said board of aldermen, as under said ordinance hereinbefore recited, or without having applied for said permission, as by said ordinance required.

"8. Therefore, we, the jury so impaneled, upon the foregoing facts so found, do return our verdict thereon as follows:

"That if the facts so found constitute in law the offense with which said defendant is charged, then we find said defendant guilty as charged in the warrant aforesaid. But if the facts so found do not in law constitute the offense with which the defendant is so charged, we find the defendant not guilty."

Upon the special verdict, his Honor declared the defendant not guilty, and the State appealed.

Attorney-General Bickett and G. L. Jones for the State.
Guion & Guion for defendant.

ALLEN, J., after stating the case: Chapter 73, subchapter 11, of the Revisal, regulates building in incorporated cities and towns having a population of more than one thousand, and it is operative in the city of New Bern, under the findings in the special verdict.

Under the provisions of section 2986 of that chapter the chief of the fire department, who is the inspector, is authorized to issue a permit to the owner of property to build, and we think this includes the power to authorize repairs to be made. If, however, this power was in doubt, it seems to be made clear by the latter part of section 3010, which reads as follows:

"No building now or hereafter built shall be altered until it has been examined and approved by the inspector as being in a good and safe condition to be altered as proposed, and the alterations so made shall conform to the provisions of the law."

We do not think section 1, chapter 61, Private Laws of 1907, amending the charter of New Bern, is in conflict with this view. It provides that the city may pass ordinances regulating the condemnation of buildings, their repair, and the erection of future buildings. This power was reserved under section 3008 of chapter 73, subchapter 11. It does not, in terms or by implication, take from the inspector the power to grant permits to repair, and is not inconsistent with the general law. The purpose of both is to protect the property of the citizen, and the city of New Bern has the power to adopt reasonable regulations, not only to enforce the provisions of the Revisal, but in addition thereto. The inspector is chief of the fire department of New Bern, selected by its authorities and acquainted with its needs. It cannot be a bad public policy to entrust him with the power to grant permits to build or repair, guided and controlled as he will be by the law from which he derives his authority and by the valid ordinances of the city.

The defendant acted in accordance with the laws of the State, and the city of New Bern cannot by ordinance make an act illegal which is legal under our statutes. If there was no conflict between the ordinance and the statute, it is not certain that the ordinance does not come within the condemnation of *S. v. Tenant,* 110 N. C., 609.

The judgment is

Affirmed.

STATE v. NORMAN LEWIS.

(Filed 15 March, 1911.)

Murder, First Degree—Evidence Sufficient.

The evidence in this case tended to show that the deceased, a chief of police of a town, went with a posse to arrest the prisoner at the latter's home at night; that he called the prisoner to come to the door; that the prisoner recognized the deceased as the chief of police and knew he had a warrant for his arrest; that the deceased waited about twenty to twenty-five minutes for the prisoner, who said he first wished to put on his shoes, and then asked the prisoner to come on, he was in a hurry; that the prisoner then said he was not coming, as deceased had a warrant for his arrest, and that then, at the prisoner's direction, his wife opened the door, as all of the lights went out, when the prisoner fired a gun directly into the breast of the officer, inflicting a wound from which he soon thereafter died. Under a correct charge, wherein the crime of murder in the first degree was defined: *Held,* evidence sufficient for conviction of murder in the first degree.

APPEAL from *Peebles, J.,* at November Term, 1910, of NASH.

Indictment for murder. There was verdict rendered that the prisoner was guilty of murder in the first degree. Judgment imposing sentence of death, and prisoner excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Hoke.*

Attorney-General and G. L. Jones for the State.
F. S. Spruill for defendant.

HOKE, J. We have given the case the careful consideration which the supreme importance of the issue demands, and find no reversible error. The evidence tended to show that on the night of 18 September, the deceased, J. M. Stallings, chief of police of the town Spring Hope, Nash County, having a valid warrant, went with two others to the home of the prisoner to effect his arrest. It was in the early hours of the night, about 8:20, and, so far as the evidence shows, there was nothing done out of the ordinary to excite the fears or arouse the anger of the prisoner, but only a call by the deceased for the prisoner to come to the door. The conversation of the prisoner showed that he recognized the deceased and that he was chief of police and had a warrant for the prisoner's arrest. Thus he said: "Chief, let me put on my shoes; I am barefooted." That he put on his shoes and delayed in the house some 20 or 25 minutes. The deceased then said: "Norman, come to the door; I am in a hurry." The prisoner replied: "I'm not coming. Some of them damn negroes have been telling lies on me. You have got a warrant for me and I'm not coming." The deceased said: "Come on; I am sort of in a hurry." The prisoner then spoke to his wife, saying: "Siddie, open that there door." Just then the light in the house went out, the door flew open and the prisoner fired a shotgun directly into the breast of the officer, inflicting a fatal wound, from which he died on the third day thereafter. That the prisoner, having then escaped by the back door, fired a shot back at the posse as he went off. On cross-examination, a witness, one of the posse, said:

Q. "Did you see Norman before the light was extinguished?" Answer: "Yes, sir."

Q. "Can you tell who shot the gun?" Answer: "Yes, sir."

Q. "Describe how you can tell it." Answer: "I heard Norman walking over the floor and talking to Mr. Stallings, and when he said, 'Siddie, open the door,' right where he stopped walking at the gun fired from."

Q. "After Stallings was shot, did you see anything of Norman Lewis?" Answer: "Yes, sir; I saw him after he came out of the back door and he got about 30 yards out in the field and shot back at us," etc.

On this and other supporting testimony, the court having defined and explained the crime of murder and stated what was required to constitute murder in the first degree, referred the question to the jury, who rendered the verdict for the higher offense. And as stated, there is nothing in the record which tends to impeach the correctness or validity of the verdict. If the two excerpts from his Honor's charge standing alone are the subject of criticism at all, they seem to err rather in favor of the prisoner, but as a matter of fact they only served to direct the mind of the jury to the controlling facts relevant to the issue, and when taken in connection with the entire charge they are free from any just exception. In *S. v. Exum,* 138 N. C., 599, the Court cites, with approval, from Thompson on Trials, sec. 2407: "That the charge of a court should be considered as a whole, in the same connected way in which it was given and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." Applying the principle, we are all of opinion that no reversible error appears, and the judgment on the verdict must be affirmed.

No error.

STATE v. SOUTHERN COTTON OIL COMPANY.

(Filed 22 March, 1911.)

1. **Fertilizers—Public Benefit—Interpretation of Statutes.**
The purpose of Revisal, sec. 3945 *et seq.*, is to protect the public from the sale of worthless fertilizers, subjecting those violating it to a penalty, section 3956, and making the offense a misdemeanor. Revisal, 3814, 3822.

2. **Same—Indictment—Evidence—Conviction.**
The defendant was tried for selling cotton-seed meal for fertilizer in violation of Revisal, 3597, under an indictment which followed the language of the statute, and the evidence showed that the defendant sold the meal in sacks upon which there were no tags or other indication of the weight of the sacks or the chemical composition of their contents, or other data respecting them, as required by the statute: *Held*, the indictment sufficient in form and the evidence fully justified a conviction; and the fact that the purchaser exchanged cotton seed for the meal was not material.

3. **Fertilizers—Tags—Data—Ingredients—Public Benefit—Defense—Interpretation of Statutes.**
A letter from the State Agricultural Department advising defendant that it would not be necessary to stamp the name and address of the manufactory on the back of the tax receipt is irrelevant as a defense in an action for violating Revisal, sec. 3957, by selling cotton-seed meal for fertilizer without tagging or showing the data required by the statute, which would indicate the weight and chemical composition of the contents of the sacks, etc.

4. **Same—Qui Tam Actions—Constitutional Law.**
It is not unconstitutional for the Legislature to make an act a misdemeanor and also impose a penalty therefor to be recovered in a *qui tam* action, and Revisal, 3814, 3822, and 3956, making it a misdemeanor and imposing a penalty for the violation of the fertilizer laws to be given in part to the one who shall sue for and recover the same, are constitutional and valid.

APPEAL from *Ward, J.*, at December Special Term, 1910, of PITT.

The defendant stood indicted in the following bill:

"The jurors for the State upon their oaths present, that The Southern Cotton Oil Company, a corporation, late of the county of Pitt, on the first day of April, 1909, with force and arms, at and in the county aforesaid, did unlawfully and willfully sell and offer for sale to J. R. Bunting a quantity of cotton-seed meal in sacks, said sacks not being branded as is required by law and said sacks containing said meal having tags attached to said sacks which did not contain and did not have branded on the tags containing it the following data, to wit: (1) Cotton-seed meal, with brand; (2) weight of package; (3) ammonia or nitrogen; (4) name and address of manufacturer, as required by law, the said meal not being offered for sale or sold to a manufacturer or manufacturers for use in manufacturing fertilizers, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The defendant was convicted and fined $50, and appealed.

Attorney-General and G. L. Jones, Assistant Attorney-General, for the State.

Moore & Long for defendant.

CLARK, C. J. Revisal, 3945-3978, contains a careful and comprehensive scheme to protect the public from the sale of worthless fertilizers and injurious foods. The most efficient method of insuring this protection is the requirement therein that the contents of each package must be shown by a label or tag. The requirement of a small tax and the certificate that it has been paid is simply incidental and to provide a means for executing the law by proper inspection and prosecution for violation of its terms. Indeed, in a case that went to the United States Supreme Court it was held that if this tax amounted to more than this the tax would be invalid as an interference with interstate commerce as to all fertilizers and foods shipped in from other States, and, of course, if the law could not be enforced against such shipments it would be a very inefficient protection to enforce it only against foods and fertilizers manufactured in this State. *Guano Co. v. North Carolina,* 171 U. S., 345.

Revisal, 3957, provides that "All cotton-seed meal offered for sale (unless sold to manufacturers of fertilizers) shall have plainly branded on the bag containing it or on a tag attached thereto the following data: (1) Cotton-seed meal, with brand; (2) weight of package; (3) ammonia or nitrogen; (4) name and address of manufacturer." To the same effect, with some additional requirements, is Pell's Revisal, 3945, which was enacted Laws 1907, ch. 670.

Revisal, 3956, makes a violation of these sections subject to a penalty of $10 for each separate bag, barrel, or package "sold or offered for sale, or removed, to be recovered by any person who may sue for the same," and Revisal, 3814 and 3822, make the violation of said provisions a misdemeanor. The indictment against the defendant is for selling cotton-seed meal without labeling it as required by law. The offense is charged in the very language of the statute. The exceptions in the statute, out of abundance of caution, are duly negatived in the indictment.

The evidence is full and uncontradicted that the defendant sold the cotton-seed meal for use as a fertilizer and there was no label of any kind, either on the sack or on the tag attached to the sack, containing the data required. There was nothing to indicate the weight or the chemical composition of the contents of the sack as required by the statute.

The defendant put in evidence the letter of the Agricultural Department, to the effect that it would not be necessary to stamp the name and address of the manufactory on the back of the tax receipt tags of 1909. This in no way affects the failure of the defendant to observe the plain requirement of the statute with respect to the weight and quality of the contents of each bag or package. Even if it had been so expressed and intended, the Department of Agriculture could not excuse or exempt the defendant from its duty to comply with the statute. The defendant is not indicted for failure to pay the tax of 20 cents per ton nor for failure to affix the tags furnished by the Department, showing payment of such tax.

The fact that the purchaser bought the cotton-seed meal by exchanging a ton of seed for 1,333⅓ pounds of cotton-seed meal does not make it any the less a sale within the meaning of the statute.

Revisal, 3814 and 3822, make a violation of the statute such as the defendant is charged and proved to have committed in this case, a misdemeanor. Revisal, 3956, also subjects the party so violating the law to a penalty of $10 for each separate bag, barrel, or package "sold, offered for sale, or removed without affixing the labels, stamps, and tags required by law." There is no inhibition in the Constitution which forbids the Legislature to make an act a misdemeanor and also to impose a penalty therefor to be recovered in a *qui tam* action. This has been customary from the earliest times in this State and in England. *School Directors v. Asheville,* 137 N. C., 510; *S. v. Holloman,* 139 N. C., 642; Revisal, 3822, 3960.

The constitutional authority of the General Assembly to aid in the enforcement of the law by authorizing "popular actions," or *qui tam* actions, as they are sometimes called, in which the penalty to be recovered is given in whole or in part to any one "who shall sue for the same," was fully discussed and sustained in *Sutton v. Phillips,* 116 N. C., 502, and in the numerous cases therein cited and approved. That case itself has been repeatedly cited and approved.

No error.

STATE v. J. V. FAULK.

(Filed 29 March, 1911.)

1. **Indictment—Common-law Misdemeanors—Superior Courts—Jurisdiction.**

   When an indictment charges an offense indictable at common law it is within the exclusive jurisdiction of the Superior Court.

2. **Same—Statutory Offense—Justice of the Peace.**

   An indictment charging that the defendant in certain public highways, in the presence of divers persons passing and repassing, "did curse in a loud voice and use profane language for the space of five minutes (reciting the profane words), with great disturbance and to the common nuisance of the good citizens of the State," states the offense of a common-law nuisance, and is within the jurisdiction of the Superior Court, notwithstanding he may have been indicted under a statute relating to a certain county whereunder conviction may have been had of a less offense, made a misdemeanor by the statute, cognizable before a justice of the peace in that county.

3. Same.

An act relating to a certain county, making it "unlawful for any person to act in a disorderly manner by being drunk or using profane, obscene, or boisterous language on any public road" therein, does not oust the jurisdiction of the Superior Court of an indictment going further in its charges, and stating a common-law misdemeanor, though conviction may have been had under the statute.

APPEAL by the State from *Lyon, J.*, at November Term, 1909, of ROBESON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Attorney-General and G. L. Jones, Assistant Attorney-General, for the State.

No counsel for defendant.

CLARK, C. J. Laws Special Session 1908, ch. 125, provides that "It shall be unlawful for any person to act in a disorderly manner by being drunk or using profane, obscene, or boisterous language on any public road in Robeson County," and places the violation of this statute within the jurisdiction of a justice of the peace.

This indictment is found against the defendant at common law and alleges that the defendant, in Robeson County, "in certain public highways there situate and in the presence of divers persons then and there being, did curse in a loud voice and use profane language in the presence of divers citizens of the State there being, passing, and repassing, and did continue in a loud voice to repeat said profane language for the space of 5 minutes (the indictment reciting the profane words), with great disturbance and to the common nuisance of the good citizens of the State." The defendant moved to quash the bill on the ground that its allegations were covered by the act of 1908, above set forth, which created an offense within the jurisdiction of a justice of the peace. The indictment at common law is within the jurisdiction of the Superior Court, the punishment not being restricted to "30 days' imprisonment or a fine of $50." His Honor quashed the bill, and the State appealed.

The sole question presented, therefore, is whether the acts recited in the statute of 1908 are sufficient to constitute the same offense which was indictable at common law. It is very clear that they do not. In *S. v. Barham,* 79 N. C., 647, the Court held that to constitute the common-law offense it must be alleged: (1) That the offense was committed in the presence of divers persons being then and there assembled, to the common nuisance; (2) that the acts were so repeated in public as to become an annoyance and inconvenience to the public, citing *S. v. Jones,* 31 N. C., 38; *S. v. Pepper,* 68 N. C., 259; *S. v. Powell,* 70 N. C., 67. In *S. v. Jones,* 31 N. C., 38, it was held that to make the offense of profane swearing indictable the acts must be so repeated and so public as to become an annoyance and inconvenience to the public, and that it is not sufficient to merely charge that they were a public nuisance, but the facts must be specifically charged which would constitute them a public nuisance. In *S. v. Pepper,* 68 N. C., 259, it was held that an allegation of profane swearing in the public streets (or other public place) to the common nuisance would not be sufficient, and that an omission to allege that the swearing was in the presence of divers persons then and there assembled would be fatal. To the same effect *S. v. Powell,* 70 N. C., 67; *S. v. Brewington,* 84 N. C., 783; *S. v. Chrisp,* 85 N. C., 528.

The subject is fully gone into by *Merrimon, J.,* in *S. v. Cainan,* 94 N. C., 880, which is nearly "on all-fours" with this case. There *Merrimon, J.,* reaffirming the principles above set forth, holds that a town ordinance making unlawful acts similar to those prescribed by this statute of 1908, was valid, because it did not cover the offense which was indictable under the general law of the State.

It is true that if the defendant had been tried on a warrant before a justice of the peace under the statute of 1908, he could have been convicted upon proof of the charges contained in the present indictment. But the opposite is not true, that upon trial upon this indictment the defendant could have been convicted upon proof only of the acts which would constitute the offense under the statute of 1908. So on an indictment for manslaughter a defendant may be proven guilty of an assault, but on proof of an assault only he cannot be convicted of manslaughter.

The acts necessary to be proven to constitute an offense under the statute of 1908 are fewer and different in extent from those necessary to constitute the offense at common law which is charged in the indictment in this case. The statute, therefore, does not constitute a substitute for the common-law offense. The two offenses are not identical, and the judgment quashing the indictment must be

Reversed.

STATE v. THOMAS DENTON.

(Filed 29 March, 1911.)

1. **Court Sittings—Proceedings—Attorneys—Notice.**
It is the duty of attorneys in a cause to take notice of the regular sittings of the Superior Court, and not that of the trial judge to send for them when they are absent, in considering their case, except "for some unusual reason," within the meaning of Rule 27 of the Supreme Court. Revisal, sec. 1541.

2. **Same—Instructions—Absence of Attorneys—Discretion of Court.**
Whether it is the duty of a judge of the Superior Court to send for counsel in a case while considering it, at a regular sitting in term, for the "unusual reason" required by Rule 27 of the Supreme Court, is a matter within the discretion of the trial judge, and will not be considered on appeal.

3. **Same.**
When a case has been given to the jury, and the jury requests the trial judge to instruct them upon the law as to certain of its

phases, it is not error for the court to comply with the request of the jury, in the absence of counsel, when done at a regular sitting of the court in term.

4. **Spirituous Liquors—Unlawful Sale—Abettors—Evidence—Instructions.**

Upon trial for violating the general prohibition law in the sale of whiskey, a charge upon supporting evidence was held correct in substance as follows: That if the jury should be satisfied from the evidence that H. owned the whiskey and brought it in a basket to defendant's home for the purpose of selling it there, and sold a pint to one D. in defendant's presence and with his knowledge, the defendant would be guilty of aiding and abetting the sale; and that as in misdemeanors all aiders and abettors are principals, the defendant would be guilty as a principal in the unlawful sale.

5. **Spirituous Liquors—Unlawful Sale—One Act—Abettors—Evidence Sufficient.**

One is guilty of an unlawful sale of spirituous liquor as a principal when he allows the use of his home for the latter to more secretly effect the sale there; and evidence tending to show that this was done and the price paid while at defendant's home in a room wherein he was lying on a lounge, though without evidence of his receiving a part of the price paid, is sufficient for his conviction as a principal in aiding and abetting the unlawful act.

HOKE and WALKER, JJ., dissenting.

APPEAL from *Cook, J.*, at September Term, 1910, of WAKE.

Indictment for the illicit sale of spirituous liquor. The defendant was convicted, and from the judgment of the court sentencing him to the roads, appeals to this Court.

Attorney-General Bickett and Assistant Attorney-General Jones for the State.

Holding & Snow and J. C. L. Harris for defendant.

BROWN, J. The record presents only two assignments of error:

1. After the jury had retired, they returned to the courtroom for further instructions. In the absence of the defendant's counsel, and without notice to him, the court deliv-

ered instructions to the jury upon a phase of the case concerning which they requested instruction. It is admitted on the argument that this occurred during the regular session of the court, and not during a recess.

Counsel must take notice of the regular sittings of the Superior Courts, the principal *nisi prius* courts of the State, and the judge presiding is not required to send for an attorney when his case is under consideration. Rule 27, in the Rules of Practice in the Superior Courts, revised and adopted by the Justices of the Supreme Court by virtue of Revisal of 1905, sec. 1541; 140 N. C., 685.

It may be the duty of the presiding judge "for some unusual reason," as stated in that rule, to send for counsel even during a regular session of the court, but from force of circumstances that is a matter which must be left to his sound discretion.

This point was considered by the Supreme Court of Iowa in *S. v. Hale,* 91 Ia., 370, where it is said: "That counsel was not advised of the court's action before the jury was brought in appears to have been his own fault. He could not be found. Counsel who are interested in a cause in which a jury is deliberating know that they may be wanted at any moment, and must either be in attendance at court or advise the court or proper officers where they can be found. Judicial proceedings cannot stop because of a failure of counsel to do their duty in this respect."

Where additional instructions are given to a jury during a recess of the court, we think counsel are entitled to be present, or at least one of them on each side, and that they should be notified, if to be found.

2. His Honor charged the jury that if they should be satisfied from the evidence in the case that the State's witness, Hodge, owned the whiskey and brought the same in a basket to defendant's home for the purpose of selling it there, and that Hodge, on the night in question, sold a pint of this whiskey to the witness Dempsey, in the presence of defendant and with his knowledge, then the defendant would be guilty of aiding and abetting the sale by Hodge to Dempsey, and that, since in mis-

demeanors all aiders and abettors are principals, the defendant would be guilty, as a principal, of selling whiskey to Dempsey.

State's witnesses, Dempsey and Hodge, testified that on the night of 19 March, 1910, they went to defendant's home and bought from him a pint of whiskey each; that defendant was lying on a lounge and was the only person in the room; that twelve or eighteen half-pint bottles of whiskey were on the table; and each laid down 50 cents on the table and took a pint of whiskey; that at same time defendant gave each a drink of "peach and honey."

The testimony of defendant's witnesses is to the effect that State witness Hodge brought this whiskey to defendant's house and placed it on the table; that on the night Dempsey bought the whiskey Hodge picked up the 50 cents from the table; that defendant was present in the room lying on the lounge, but did not get the money paid for the whiskey.

All of the defendant's evidence tends to prove that Hodge was using defendant's home as a place where he could sell his whiskey with less danger than at his store, and that Hodge sold it there in defendant's presence on the occasion in question and received the money for it.

The instruction excepted to was given in response to a request from the jury for further instructions upon that phase of the evidence, that "the whiskey had been brought to defendant's home by Hodge and allowed by defendant to be sold by Hodge in the house and in the presence of defendant," and the instruction presupposes such finding of facts. In view of the evidence to support it, we think the instruction entirely correct.

It is well settled that if one aids and abets another in the commission of a misdemeanor, he is guilty as principal, and this elementary principle of law has been applied to one who aids another in the illicit sale of liquor. In the text of Cyc., vol. 23, p. 209, we find it laid down that, "Any person who aids and abets or assists in or procures an unlawful sale of intoxicating liquors may be indicted as a principal in the transaction, such offense being a misdemeanor."

Assuming the facts to be as stated in the instruction, how could the defendant more effectually aid and abet Hodge in his criminal traffic than by permitting him to sell his whiskey in the privacy of defendant's own home, where there was much less probability of detection than at Hodge's store? Suppose a band of counterfeiters had been found in defendant's house manufacturing their spurious money in defendant's presence, could it be said that he was not thereby aiding and abetting them?

It is not even suggested that Hodge had taken possession of defendant's house *vi et armis* and that defendant was under duress, or that he was *non compos mentis.* It is not an inference to be drawn by the jury from the circumstances in evidence, but the law itself infers that, in the absence of any evidence of duress or insanity, what was done in defendant's home and in his presence was done by his consent and contrivance.

To the mind of the writer, the proposition embodied in the instruction is so evidently correct that it is difficult to discuss, and needs no citation of authority to support it.

Nevertheless, the Supreme Court of Massachusetts has decided practically the question involved in this case. In *Com. v. Hayes,* 167 Mass., 176, it is held that one may be convicted for the unlawful sale of or keeping for sale of intoxicating liquors if the jury find that he kept or maintained the premises, and that any part thereof was, with defendant's consent, used for the illegal sale or keeping of spirituous liquors.

If the defendant knowingly permitted Hodge to use his home for the illicit sale of whiskey on one occasion, he is an aider and abettor on that occasion, and it is as much a violation of law as if he habitually permitted it.

No error.

HOKE, J., dissenting: There was evidence for the State direct and positive that defendant sold a pint of whiskey to L. A. Dempsey, a State's witness, and to another witness by the name of Hodge, but I am of opinion that the Court is not sufficiently advertent to the fact that the jury evidently were not willing to accept or act on this testimony, but that defendant has been convicted on the theory that defendant's evidence is true. This testimony very correctly summarized in the opinion of the Court was in part as follows: "Hodge brought the basket of whiskey to our house and asked Tom to keep it for him. This was on Saturday before the night he and Dempsey came there. He waited until Tom came. It sat there on the desk from the night Hodge brought it there. I never saw Tom take anything out of the basket at any time. I saw Hodge pick up the 50 cents and put it in his pocket. Tom was lying down at the time, and he did not get any of the money. Hodge was pretty drinky. I am defendant's wife." In this connection the State's witness Dempsey testified: "After Denton was arrested and before he was tried, Hodge told me to go to see Denton and tell him that if he (Denton) would stand out of the way, he (Hodge) would take care of his family while he was gone. I went and told Denton what Hodge said. This was on Monday after we got the whiskey." As to the progress of the trial the record then states: "The jury, after remaining out for some time, came into court and asked for further instructions upon the question of the whiskey having been brought to defendant's house by the State's witness, Hodge, and ALLOWED by defendant to be sold by Hodge in the house and in the presence of defendant." In response to the inquiry, his Honor said to the jury: "That if they should be satisfied from the evidence in the case that the State's witness Hodge owned the whiskey and brought the same into defendant's house for the purpose of selling it there, and that Hodge, on the night in question, sold a pint of the whiskey to the witness Dempsey, in the presence of defendant and with his knowledge, then the defendant would be guilty of aiding and abetting the sale by Hodge to Dempsey, and that since in misdemeanors all aiders and abettors are principals, the defendant would be guilty, as a principal, of selling whiskey to Dempsey." To this response the defendant in apt time excepted.

Undoubtedly, it is an elementary principle, as stated in the Court's opinion, that one who aids and abets another in the commission of a misdemeanor may be convicted as a principal.

And it is equally elementary that one does not necessarily become either an aider or abettor in a crime because it is committed on his premises, though it is done with his knowledge and in his presence. In Clark's Criminal Law, p. 103, it is said: "To aid and abet the commission of a crime is to assist or encourage the perpetrator. There must be some participation. Mere presence and neglect to endeavor to prevent a felony will not of itself make one a principal in the second degree," etc. And in McLean's Criminal Law, sec. 194, the author says: "Some degree of participation in the criminal act must be shown in order to establish criminal liability. Proof that one stood by at the commission of a crime without taking steps to prevent it, does not alone indicate such participation or combination in the wrong deed as to show criminal liability, although he approves the act." In like effect is *S. v. Douglas*, 26 Pac., 276; *White v. People,* 81 Ill., 334, and, so far as examined, the principle is uniformly approved.

There is no evidence that Hodge was in the habit of doing this thing. The one basket of whiskey is all that the testimony shows was brought to defendant's house. Neither the evidence of defendant on which the jury acted nor the charge of the court to which the exception was taken contains the suggestion that defendant knew that the whiskey was being brought to the house by Hodge for the purpose of being sold—as a matter of fact it came in defendant's absence, and, to my mind, by correct interpretation this question of the jury and response of the judge can and was only intended to mean that defendant was guilty as aider and abettor if Hodge brought the whiskey to the house of defendant and there sold it in his presence and with his knowledge. Such a conclusion might very well be drawn from the facts in evidence, but if it is done it should be by the jury and not by the court; for under the circumstances suggested guilt does not necessarily follow because of an alleged sale by Hodge on defendant's premises and in his presence. Our Constitution provides that "No person shall be convicted of crime but by the unanimous verdict of a jury of good and lawful men in open court," and this Court has been uniformly insistent that this right shall be properly safeguarded and applied in the administration of the criminal law. Speaking to this question in *S. v. R. R.,* 149 N. C., 512, the Court said: "The ruling made on the former appeal in this case, and sustained in the forcible opinion of *Associate Justice Brown,* was, that when there was conflict in the evidence on any essential feature of the charge, or when, though there was no such conflict, more than one inference of fact was permissible, and any one of these consistent with defendant's innocence, the question of his guilt or innocence was for the jury and not for the court. This is by no means a trivial or technical distinction, but goes to the integrity and very existence of the right of a citizen to a trial by jury. If, on the testimony, there is an inference of defendant's innocence permissible, and a judge is allowed to charge the jury, 'If they believe the evidence they will find defendant guilty,' this is condemnation by the judge, and the right of trial by jury, so justly valued as the ultimate protection of freemen under the forms of law, is usurped by the judge, and the constitutional rights of the defendant are denied him. 'No person shall be convicted of crime but by the unanimous verdict of a jury of good and lawful men in open court,' is the language of our Bill of Rights; and if there is an inference of guilt and one of innocence arising on the evidence, the jury must determine which inference shall be established. As said by *Henderson, J.,* in *Bank v. Pugh,* 8 N. C., 206: 'The jury are the constitutional judges, not only of the truth of the testimony, but of the conclusions of fact resulting therefrom.'" In the case from Massachusetts upon which the Court seems disposed to rely, the charge of the trial judge was that, "If the jury should find that the defendant kept and maintained the premises and that any part thereof not rented to Campbell was with the assent of defendant used for the illegal sale of intoxicating liquors, and that *was one* of the *purposes* for which said *premises was kept* by *defendant,* he should be convicted"—an entirely different proposition from that presented here. The defendant may be a person of humble position. He may be and very probably is flagrantly guilty, but in the present case he embodies in his person and in his cause the constitutional right to a trial by jury. If it is struck down in him it is weakened for every citizen of the Commonwealth.

On the record I am of opinion that this conviction has not been had in accordance with law and that a new trial should be awarded.

Associate Justice Walker concurs in the dissenting opinion.

STATE v. CEDAR WORKS.

(Filed 8 March, 1911.)

Navigable Streams—Obstruction—Evidence—Burden of Proof.

To maintain an indictment for obstructing a canal, it must be shown that the canal was a navigable stream.

Appeal by defendant from *J. S. Adams, J.*, at Fall Term, 1910, of Tyrrell.

Attorney-General and George L. Jones for the State.
Aycock & Winston and W. M. Bond for defendant.

Per Curiam. The defendant was indicted for obstructing Basnight's canal. There is no evidence to show that the canal was a public navigable stream, and his Honor erred in submitting the case to the jury.

This renders it unnecessary to consider any of the other exceptions in the record.

Error.

INDEX.

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

ABANDONMENT. See Marriage and Divorce, 7, 8, 9.

ABETTORS. See Spirituous Liquors, 7, 8.

ABUTTING OWNERS. See Highways, 3, 4, 5; Cities and Towns, 13.

ACCEPTANCE. See Contracts, 6; Cities and Towns, 14.

ACCESS. See Injunctions, 2, 3, 4.

ACCIDENT. See Negligence, 15.

ACCOUNTING. See Executors and Administrators, 2; Descent and Distribution, 5, 6, 7; Usury, 6.

ACCUSED, RIGHT OF. See Constitutional Law, 17, 18, 19, 21.

ACTIONS.

Parties—Interest — Oyster Beds—Vacate Grants—Attorney-General—Authorization.—One who has no interest in the lands, other than that of a citizen of the State, cannot maintain an action to vacate a grant to an oyster bed (Revisal, 1748, 1750), and under such circumstances the Attorney-General is the only one who may maintain the action, it being his duty alone to look out for the interests of the State in such matters; and his authorization to another to bring the action is insufficient. Cases of *quo warranto* distinguished. *Jones v. Riggs*, 281.

ADJOINING OWNERS. See Cities and Towns, 4, 5; Estoppel, 3, 4.

ADMISSION. See Damages, 8.

ADVANCEMENTS. See Descent and Distribution, 4, 5, 6, 7, 9.

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AIDER. See Pleadings, 4; Deeds and Conveyances, 46.

ALIGHTING PASSENGERS. See Railroads, 27, 28.

ANSWER. See Pleadings.

ANTE LITEM MOTAM. See Evidence, 68.

APPEAL. See Cities and Towns, 2.

APPEAL AND ERROR. See Habeas Corpus, 1, 3; Reference, 7.

1. *Appeal and Error—Courts—Expression of Opinion—Interpretation of Statutes.*—In this case the judge in charging the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff bases the eleven thousand and some odd dollars": *Held*, this was not an expression of opinion prohibited by Revisal, 535, it not appearing that the expressions used were pertinent to the issue, or were prejudicial to appellant, or corroborative of an alleged error based upon his admitted ignorance, or failure to comprehend plaintiff's claim, upon which the law was incorrectly charged. *McDonald v. MacArthur*, 11.

2. *Appeal and Error—Original Transcript—Filing—Requisites.*—A motion for *certiorari* based upon allegation that the judge had not settled the case on appeal, without laches on the part of appellant, will not ordinarily be granted when the appellant has not caused to be docketed the transcript of the record proper as the foundation for the motion. *Walsh v. Burleson*, 174.

3. *Same—Excusable Neglect—Clerk's Fees—Undertaking—Settled by Judge.*—The right to appeal is not an absolute right, for the appellant must comply with the conditions prescribed for its prosecution; and when he seeks to excuse his laches in not having the original transcript filed "by reason of lost papers, or for any other good cause," alleging that the judge had the papers and had not duly settled the case, and it appears by affidavit of the clerk and judge and others that the papers had been permitted to remain in the clerk's office without payment to him of his fees or filing an appeal bond, the appeal will be dismissed. *Ibid.*

4. *Instructions, Detached Portions—Record—Appeal and Error.*—The incorrectness of a charge may not be determined on appeal from one or two detached portions excepted to, and when the entire charge is not set forth in the record, it will be assumed that it correctly stated the law of the case to the jury, in the absence of any showing to the contrary. *S. v. Malonee*, 200.

5. *Appeal and Error—Instructions—Entire Record—New Trial—Procedure.*—When the charge of the trial court is erroneous

APPEAL AND ERROR—*Continued.*

in respect to that part excepted to by the defendant, and the entire evidence relative to the inquiry is before the court. from which it is perfectly apparent that in no aspect of it is there any defense available, a new trial will not be granted. *Bateman v. Lumber Co.*, 248.

6. *Same — Exceptions — Appeal and Error — Procedure.* — The amendment making additional parties does not affect the decision in this case, as thereby the subject of the controversy was not changed, the additional parties being the beneficiaries for whom this action was brought, and proper parties (Revisal, 400) ; and if it be conceded that the solicitor was an unnecessary party, that is not ground for an exception. *Kerr v. Hicks*, 265.

7. *Appeal and Error—Referee—Findings—Judgment—Evidence.* The findings of fact by a referee, supported by evidence and sustained by the trial court, are not reviewable on appeal. *Brown v. R. R.*, 300.

8. *Appeal and Error—"Case Settled"—Negligent Killing—Measure of Damages—Net Earnings—Support of Family.*—In an action for damages for the wrongful killing of plaintiff's intestate, it is not error to refuse an instruction which limited recovery to the earnings, after deducting the cost the deceased would have incurred in supporting his family depending upon him, the object of the statute being to render compensation as near as may be for the actual money value of the life by estimating the present cash value of his probable net earnings above the necessary expenses for his own support. *Roberson v. Lumber Co.*, 328.

9. *Evidence — Nonsuit — Defendant's Evidence.*—Evidence introduced by defendant cannot be considered for him on his motion to nonsuit the plaintiff upon the evidence, and it was reversible error for the trial judge to permit defendant to introduce a deed pertinent to the inquiry during the taking of plaintiff's testimony and consider it in granting defendant's motion. *Boddie v. Bond*, 359.

10. *Appeal and Error — Reference — Remand—Rereference—Procedure.*—Upon appeal in this case the Court so decidedly departed from the basis of accounting adopted by the referee that it is directed that it be remanded to him with directions to restate the account and revise his findings of fact, hearing further testimony if he considers it desirable to do so. *Tart v. Tart*, 502.

APPEAL AND ERROR—*Continued.*

11. *Appeal and Error—Issues of Fact—Questions for Jury.*—In the defendant's appeal it appears that the jury found for plaintiff upon matters of fact properly submitted, and no error is found. *Carson v. Bunting,* 530.

12. *Appeal and Error—Verdict Set Aside—Discretion—Reason Given.*—Whatever may have been the reason given by the trial judge in setting aside a verdict, no appeal will lie when it actually appears that he had set it aside as a matter within his discretion. *Dowdy v. Dowdy,* 556.

13. *Appeal and Error—Appeal Dismissed—Decision—Supreme Court's Discretion.*—Though an appeal be dismissed by the Supreme Court as premature, the Court may, in its discretion, consider the questions presented. *Ibid.*

APPLICATION. See Debt, 1, 2, 3, 4, 5.

APPLICATION OF FUNDS. See Schools and School Districts, 6.

APPOINTMENT. See Religious Societies, 2, 3.

ARBITRATION AND AWARD.

Arbitration and Award—Court's Jurisdiction—Ouster—Effect—Estoppel.—When the effect of an agreement to arbitrate controversies which may arise in the course of executing a contract is to oust the jurisdiction of the courts in such matters, it cannot be enforced against one of the parties as a condition precedent to his bringing his action; though as to other matters embraced therein which have arisen and have been referred to arbitration, and as to which an award has been rendered, the effect of the award is to conclude the parties. In this case amendment to pleadings is suggested so as to conform the issues to matters left in dispute. *Williams v. Mfg. Co.,* 205.

ASSESSMENT. See Constitutional Law, 1; Cities and Towns, 17.

ASSETS. See Corporations, 1.

ASSIGNMENT. See Mortgage, 3, 4, 5, 6, 7; Insurance, 3, 4, 5, 6, 8.

ASSOCIATIONS. See Religious Societies.

ASSUMPTION OF RISKS. See Issues, 7.

1. *Master and Servant—Negligence—Defects—Duty to Repair—Assumption of Risks.*—An employee whose duty it is to make a second inspection of freight cars before they leave the railroad yards in a train, and to see that the car doors are properly fastened, secured, and in condition, assumes the risks

ASSUMPTION OF RISKS—*Continued.*

of his employment and cannot recover damages caused by a car door swinging loose and down at one end of the rail at the top, along which the door runs upon wheels, when he is furnished with appliances sufficient to repair a defect at the bottom of the door, readily discernible, and when its repair would have prevented the injury complained of. *Lane v. R. R.*, 91.

2. *Negligence—Assumption of Risks—Issues—Instructions—Procedure.*—In order for a defendant to make the defense of assumption of risk available to him on the trial, it is necessary for him to tender an issue or ask for an instruction thereon. In this case he has received the benefit of the plea under the issues of contributory negligence. *Harvell v. Lumber Co.*, 254.

3. *Negligence—Master and Servant—Safe Place to Work—Safe Appliances—Evidence—Assumption of Risks—Questions for Jury.*—The plaintiff was employed to pack lint cotton in defendant's packing-room at its cotton mills as it was blown there with the use of steam fans, the room being 7 feet wide, 14 feet long and 14 feet high. There was evidence tending to show that the door to this room was negligently bolted from the outside, and that through the negligence of the defendant in not keeping the oil cups of the engine in proper repair and in not securely fastening the engine, the lint cotton caught afire while plaintiff was at work, to his damage; that he had to force open the door, as no one heard his calls; that while fire from the ignited cotton covered the room he had to dig down through the cotton to the door, which should have been opened from the inside, and that to get out it was customary to call to employees on the outside; that the machinery had not been inspected during the six months of plaintiff's employment; that another like machine used by defendant did not shake while in operation; and that the fire originated at the bearings of the defective machine, and that lint cotton was on the machinery and connecting pipes. The judge correctly charged upon the questions of *res ipsa loquitur*, of accident, of the duty of the master to furnish his servant a safe place to work, of the master's duty to furnish and inspect the appliances used, and it is *Held*, (1) the evidence is sufficient to go to the jury upon the question of defendant's negligence; (2) that an employee does not assume the risk of an injury caused by the failure of the master to perform a duty imposed on him by law, in furnishing a safe place to work, and this duty cannot be delegated to another so as to exempt the master from liability. *Norris v. Mills*, 474.

ATTORNEY-GENERAL. See Actions, 1.

ATTORNEYS AT LAW. See Courts, 22, 23, 24.

1. *Application for License—Supreme Court—Investigation—Affidavits — Defamation—Absolute Privilege.*—Affidavits filed in the Supreme Court in response to a citation by that Court and used while considering the question of granting a license to an applicant to practice law are absolutely privileged, and no action for damages will lie because the affidavits contained defamatory relevant matter affecting the character of the applicant. *Baggett v. Grady*, 342.

2. *Same—Conspiracy—Evidence.*—The Supreme Court has complete jurisdiction over the granting of licenses to practice law; and when the Court has under consideration the question of granting a license to an applicant, and issues a citation to certain persons to appear, and in compliance therewith they do appear and file affidavits relevant to the inquiry and affecting the character of the applicant, no evidence of conspiracy is shown, the defamatory matters contained in the affidavits being absolutely privileged, and called for by the Court in the progress of the inquiry. *Ibid.*

3. *Witnesses—Privileged Communication—Responsive Answers—Objections and Exceptions.*—It is the province of counsel to object to irrelevant matter, and a responsive answer by a witness to a question of a defamatory nature, when no objection is made, or, being made, is overruled, cannot make the witness liable in an action for damages. *Ibid.*

ATTORNEY'S FEES. See Measure of Damages, 1.

AUDITOR. See Mandamus, 1, 2.

AUTHORITY. See Decisions, 1.

AUTHORIZATION. See Actions, 1.

BAILEE, GRATUITOUS. See Spirituous Liquors, 4.

BANKRUPTCY.

1. *Bankruptcy—Trustee—Bond—Evidence.*—A certified copy of the bond of a trustee in bankruptcy and the order of the referee approving it is sufficient evidence of the official character of the trustee named therein and of his right to sue for and recover the property of the bankrupt. *Wilson v. Taylor*, 211.

2. *Issues, Form of.*—It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair oppor-

BANKRUPTCY—*Continued.*

tunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on its merits. *Ibid.*

3. *Same.*—In this action brought by the trustee in bankruptcy to recover of a creditor the amount of an alleged preference under the Bankrupt Act, it was *Held*, that an issue, "Is the defendant indebted to the plaintiff, and, if so, in what sum?" was preferable to separate issues as to the various elements necessary under the Bankrupt Act to constitute a preference; and it appearing that the case was correctly tried under the issue submitted, the alleged preferred creditor will not be heard to complain that he had not introduced pertinent evidence because the various issues tendered by him had been refused by the court. *Ibid.*

4. *Bankruptcy — Preferences.* — A preference by an insolvent debtor is given under the Bankrupt Act if, within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication, he procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Ibid.*

5. *Same—Inquiry—Notice Implied.*—When a person receiving or to be benefited by a preference prohibited by the Bankrupt Act, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it is voidable by the trustee, and he may recover the property or its value from such person. *Ibid.*

6. *Bankruptcy—Preferences—Fraud in Law—Constructive Fraud.* In order to invalidate a preference received under the provisions of the Bankrupt Act, it is not necessary to show any moral or actual fraud, as it is only a matter of constructive fraud, arising by law upon the existence of certain transactions forbidden by the act, the purpose of which is to prevent creditors from obtaining a preference over others of the same class. *Ibid.*

7. *Bankruptcy—Preference.*—It is not material whether a payment or transfer prohibited by the Bankrupt Act is made directly or indirectly to the creditor whose claim is preferentially satisfied thereby, for it is sufficient if he receives the benefit of the preference. *Ibid.*

BANKRUPTCY—*Continued.*

8. *Same—Inquiry—Constructive Notice.*—Actual knowledge or belief of the intent to prefer is not required by the Bankrupt Act, and a reasonable cause to believe that such was the intent is sufficient. A party affected by notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired if he had made the necessary effort to discover the truth. *Ibid.*

9. *Same—Rule of the Prudent Man.*—Under the provisions of the Bankrupt Act a creditor has reasonable cause to believe his debtor intends to prefer him when such a state of facts is brought to his attention as would lead a prudent man, when put upon his guard, to the conclusion that such is his intent. *Ibid.*

10. *Same—Evidence—Notice.*—In this case there was evidence tending to show that a creditor, to whom her debt had been paid under a clause of preference in a deed of assignment, and which was sought to be recovered by the debtor's trustee in bankruptcy, told the trustee that she was protected by the deed of assignment and admitted to him that she had been informed of her preference as a creditor, and asked and received the money for her debt by virtue of the preference: *Held,* upon any view of the testimony, she had knowledge of facts and circumstances from which the law clearly implies notice. *Ibid.*

BENEFICIARIES. See Insurance, 2.

BENEFITS. See Insurance, 1, 2.

BOND ISSUES.

Schools — Taxation — Bond Issues — Races — Discrimination.—When a legislative enactment clearly indicates that its controlling purpose and, in several places, its expressed intent is to establish a special taxing district for the purpose, by an increase of taxation and an issue of bonds, of affording additional school facilities within the prescribed district, the beneficent purpose of the act will not be frustrated because, in one of the sections, it is designated as a "school district for the white race." *Bonitz v. School Trustees,* 375.

BOUNDARIES. See Evidence, 4, 5, 13; Deeds and Conveyances, 18, 40, 41, 42, 43, 44; Counties, 1, 2, 3; Estoppel, 6.

BREACH OF PROMISE. See Marriage and Divorce, 1, 2, 3, 4, 5, 6.

BUILDING. See Cities and Towns, 21, 22.

BURDEN OF ISSUE. See Burden of Proof, 2.

BURDEN OF PROOF.

1. *Master and Servant—Safe Place to Work—Appliances—Burden of Proof.*—In order for a servant to recover damages of the master for an alleged failure to furnish safe machinery and appliances, the servant must show, (1) that the implement furnished by the master was, at the time of the injury, defective; (2) that the master knew of the defect or was negligent in not discovering it and making the needed repairs; (3) that the defect was the proximate cause of the injury. *West v. Tanning Co.*, 44.

2. *Negligence — Evidence — Burden of the Issue — Questions for Jury.*—Where the doctrine of *res ipsa loquitur* applies, the question of a defendant's responsibility must be referred to the jury, not under any presumption changing the burden of the issue, but as presenting a cause in which evidence has been offered from which negligence on the part of the defendant may be inferred. *Turner v. Power Co.*, 131.

3. *Habeas Corpus—Supreme Court — Certiorari — Jurisdiction—Value of Goods Stolen—Sentence—Burden of Proof—Indictment—"Aggravation"—"Hardened Offender"—Interpretation of Statutes.*—It appeared in the record in this case that defendant, suing out a *certiorari* in the Supreme Court in *habeas corpus* proceedings, was sentenced for a term of five years, of which he has served eighteen months; that he had been indicted for stealing goods to the value of $10; that theretofore he had, on separate occasions, been convicted for shooting a man, for retailing, and for larceny, in all of which judgment was suspended, but all of them had gone off the docket; that in the present proceedings the judgment cited the former convictions and that it had been made to appear that the stolen goods were worth between $250 and $300. It was contended by petitioner that under our statutes, Revisal, secs. 3500, 3506, a sentence for more than one year is illegal: *Held,* (1) the amount alleged in the bill of indictment (here $10) is not conclusive on the question of punishment; (2) the amount or value of the stolen property is not now an essential ingredient of the crime of larceny, and it is only a matter of amelioration of the punishment, to be raised and determined at the instance of defendant as an issue of fact on the trial; and therefore there is no indication on this record and judgment that the sentence was not within the power of the court that imposed it; (3) that the record and judgment showed a case "of much aggrava-

BURDEN OF PROOF—*Continued.*

tion or of hardened offenders," where, in the discretion of the court, a sentence not exceeding ten years may be imposed. *In re Holly*, 163.

4. *Murder—Manslaughter — Self-defense—Deadly Weapon—Willing Acts—Burden of Proof.*—It being admitted that defendant killed deceased with a pistol, it is for him to prove that it was done in self-defense, if that plea is relied on; and an objection that there was not sufficient evidence that he acted willingly is not tenable, the law presuming that he did. *S. v. Simonds*, 197.

5. *Railroads — Negligent Burning — Right of Way—Combustible Material — Causa Causans — Burden of Proof.*—To recover damages of a railroad company for carelessly and negligently communicating fire to its right of way which spread to and burned plaintiff's lands, the burden of proof is on plaintiff to show that defendant negligently permitted combustible matter to accumulate on its right of way and that defendant communicated fire from its engine to its foul right of way and from thence it was communicated to plaintiff's land and caused the injury. *Maguire v. R. R.*, 384.

6. *Master and Servant—Duty of Master — Breach — Burden of Proof.*—In an action to recover damages on account of negligence, the burden is upon the plaintiff to satisfy the jury that defendant owed him a duty at the time of his injury; that there was a breach of that duty, and that this breach was the cause of the injury. *Mercer v. R. R.*, 399.

7. *Contracts—Breach—Goods Sold—Damages—Admissions—Burden of Proof—Delivery—"Ready and Willing."*—In an action to recover for a balance of goods sold under a contract, the answer admitted that defendant had received and paid for a part of the goods, alleging that he did so upon plaintiff's promise and assurance that the remainder would be of a certain standard quality: *Held*, to recover the contract price of the balance of goods, refused upon the allegation that they did not come up to the standard fixed by the contract, the plaintiff must show that it was ready and willing to deliver them, which was denied; and plaintiff's motion for judgment upon the admission in the answer, on the ground that the defendant could not refuse to accept the balance of the goods on account of defects in the goods already received, was properly denied. *Cotton Mills v. Hosiery Mills*, 462.

8. *Divorce a Mensa—Abandonment—Wife's Conduct—Burden of Proof.*—The wife in showing abandonment, by her husband's

BURDEN OF PROOF—*Continued.*

conduct in compelling her to leave home, in her action for divorce must also show that his cruel conduct was unwarrantable, and not the proximate cause of her own acts done at the time. *Dowdy v. Dowdy*, 555.

9. *Navigable Streams—Obstruction—Evidence—Burden of Proof.* To maintain an indictment for obstructing a canal, it must be shown that the canal was a navigable stream. *S. v. Cedar Works*, 649.

BURNING. See Railroads, 9, 10, 11, 12, 13, 15.

CALLS. See Deeds and Conveyances, 18.

CARRIERS OF PASSENGERS. See Railroads; Master and Servant, 21, 22.

CANCELLATION. See Insurance, 9.

CASE SETTLED. See Appeal and Error, 3, 8.

CAUSAL CONNECTION. See Negligence, 2; Evidence, 20; Railroads, 9, 12.

CERTIORARI. See Habeas Corpus, 1, 2, 3, 4, 5, 6, 7.

CHALLENGES. See Jurors, 2.

CHANCE. See Lottery, 1, 2.

CHILDREN. See Wills, 4, 6.

CHURCHES. See Religious Societies.

CITIES AND TOWNS.

1. *Legislative Powers—Constitutional Law—Cities and Towns—Paving Streets—Assessment.*—The Legislature has constitutional authority to authorize a city to improve its streets by creating each street, or a portion thereof, a taxing district, and requiring a prescribed portion of the cost of the paving of said street to be assessed upon the abutting property on each side of the street, according to the frontage of each lot. *Shank v. Asheville*, 40.

2. *Cities and Towns—Paving Streets — Prerequisites — Jurisdictional—Order—Appeal—Injunction—Equity.*—When, under a statutory authority given a city to pave its streets, it is among other things required that a petition be filed by the owners of a majority of the front feet abutting thereon and notice be given, etc., prior to an order made by the aldermen, and it appearing that the order had been made upon petition

CITIES AND TOWNS—*Continued.*

after giving the notice required by the statute, and in other respects in pursuance of the act, and no objection entered or appeal from the order as provided for: *Held,* after the expiration of five years an order restraining sale of plaintiff's property to pay for the paving will not be granted to two of the abutting owners on the street, upon the ground that a majority, as provided, of the abutting owners had not in fact signed the petition; (1) the assessment and levy, as made, had the effect of a judgment and lien; (2) though the petition was a prerequisite, it was not jurisdictional, and the order, in effect, was a finding that the petition was true, and, not appealed from, was conclusive; (3) the statutory notice made the plaintiffs parties to the proceedings; (4) the granting of a restraining order after five years would be inequitable to the other taxpayers and property-owners of the town. *Ibid.*

3. *Cities and Towns—Ordinance—Nuisance—Alleyway—Access to Property—Procedure.*—The defendant town, by an ordinance criminal in its nature, declared plaintiff's alleyway a nuisance and dangerous to the public, and closed it up. Plaintiff brings his action for damages and mandamus and injunction, on the ground that he had been deprived of access to his property: *Held,* the action was not to enjoin the enforcement of the criminal law, but to determine and enforce plaintiff's property rights, leaving open to the defendant the right to prosecute him under the ordinance. *Crawford v. Marion,* 73.

4. *Cities and Towns — Streets — Adjoining Owner—Access—Injunction—Damages—Procedure.*—The right of ingress and egress over one's own land to and from a public street is an incident to ownership and constitutes a property right; and an injunction will lie against a town to prevent its depriving an abutting owner to a street of access to his land, and may be joined in the same action with demand for damages. *Ibid.*

5. *Cities and Towns—Streets—Adjoining Owner—Access—Procedure.*—It appears in this case that the plaintiff has been provided with a temporary entrance to his land, and a temporary order restraining the defendant from closing the one complained of is unnecessary and will not be granted. If it should be finally determined that the alleyway, the subject of the action, is dangerous to the public, or a nuisance, the court will consider the best means of abating or remedying it. *Ibid.*

CITIES AND TOWNS—*Continued.*

6. *Cities and Towns — Streets—Roads—Corporate Limits—Control.*—When a public highway enters an incorporated town, or such town builds up on one already existent, it usually follows that the highway, or so much thereof as is within the corporate limits, comes under the regulation and control of the corporate authorities as a part of the public streets. *Moore v. Meroney*, 158.

7. *Cities and Towns — Streets—Roads—Discontinuance—Legislative Powers—Compensation.*—In the absence of constitutional restraint, the authorities of an incorporated town have power to vacate or discontinue a street or public way, but when such street has been once established they can do so only by legislative sanction expressly given or necessarily implied from powers which are so conferred, and then compensation must be made to abutting owners whose property is injured. *Ibid.*

8. *Cities and Towns — Streets—Roads—Obstructions—Changes—Abutting Owner—Damages.*—When a change is made in its streets, or the street is discontinued by the authorities of an incorporated town by legislative sanction, a landowner, as a rule, is restricted to a claim for the damages arising therefrom to him. *Ibid.*

9. *Cities and Towns—Streets—Roads—Changes—Legislative Authority — Taxpayer — Abutting Owner — Right of Action.*—When a change is made in a street by the authorities of an incorporated town, with or without legislative sanction, the change being recognized as valid, and acquiesced in by the general public, their action cannot be questioned in a civil suit of a private citizen by reason of his being a general taxpayer of the town; but, if maintainable at all, it can only be done by a landowner whose property is affected by the change, and who will suffer some peculiar and special injury by reason of it. *Ibid.*

10. *Cities and Towns — Streets — Roads—Dedication—Conduct—Ratification by Public.*—The incorporated town of M. altered the course of a portion of an old State road within its limits and substituted a broad, commodious street. At that time C. owned land on both sides of the old way, and was the only one whose property was affected. The property of C. abutted on the new street, and he made no objection, but by his fencing and other acts openly acquiesced in the change, inclosing the entire property, included the old way and used it as his own. A part of this property was sold and con-

CITIES AND TOWNS—*Continued.*

veyed to plaintiff, who brings his action against the defendant, who bought the other part, to compel him to remove a house he had erected on the old road, and to compel the town to keep the old road open: *Held*, (1) the conduct of C. amounted to a dedication, and precludes plaintiff, who holds his title, and who purchased with knowledge of all the facts, from maintaining his action; (2) as to whether the public would be estopped from questioning the substitution of the new way for the old by a period of acquiescense, *quære*. *Ibid.*

11. *Cities and Towns—Streets—Roads—Deeds and Conveyances—Recitals—Boundaries—Rededication—Evidence.*—The plaintiff in his action seeks to compel defendant to remove as an obstruction a house he had erected in an old public road, within the corporate limits of the town, and the town to keep this road open. At this place the proper authorities of the town had changed the road to a new location, and the acts of plaintiff's grantor, binding upon plaintiff, amounted to a dedication of the new road in substitution of the old one. This new road, at the time, affected only the land of plaintiff's grantor, who was also the grantor to the defendant of the land whereon the obstruction complained of was situated: *Held*, the fact that plaintiff's deed calls for the old road as a boundary was merely a matter of description, being copied from some old deeds made when conditions were different, and did not amount to a rededication. *Ibid.*

12. *Cities and Towns—Streets—Roads—Dedication—Ratification—Limitation of Actions—Evidence.*—The principle that an abandonment of a public way cannot be presumed, if at all, from nonuse, for any period short of twenty years, has no application where there has been a positive act of dedication and abandonment on the part of the owner, accepted and acquiesced in by the public. *Ibid.*

13. *Cities and Towns—Streets—Easements—Value—Abutting Owners—Reversion—Contracts—Interpretation of Statutes.*—The plaintiff, a railroad, and a terminal company, desirous of connecting their property, entered into an agreement with a city that it should agree to the procurement of a legislative act authorizing the condemnation of a street to effectuate that purpose, the former corporations agreeing to pay the city for the easement and to build certain improvements on their adjoining lands. The act passed according to this agreement, providing that under certain named conditions the street should revert to the city for public purposes. The

CITIES AND TOWNS—*Continued.*

plaintiff denied the right of the city to compensation for the easement over the street, upon the ground that, as abutting owners, they held the fee therein: *Held*, (1) a city holds the easement in its streets in trust for all its citizens, and was entitled to compensation from the plaintiffs; (2) here it was entitled to compensation under an express agreement relative to the passage of the act; (3) the act itself recognized the value of the easement in the street to the city, and provided for the reversion under named conditions. *R. R. v. Wilmington*, 331.

14. *Cities and Towns—Streets—Dedication and Acceptance—Implied—Acts of Parties.*—An offer of dedication and acceptance of a way for a street in an incorporated town may be sufficiently evidenced by the acts of the owners of the land and the town authorities, and in this case the acts of dedication and acceptance held sufficient by the acts of the owners in acquiescing for years in the use of the *locus in quo* as a public street, in naming the street as boundaries to lands conveyed by the abutting owners, and by the acts of the incorporated town in paving the sidewalks of the street and maintaining it. *Jeffress v. Greenville*, 490.

15. *Cities and Towns — Streets—Condemnation—Legislature—Inherent Powers—Constitutional Law.*—While there is no constitutional provision giving the Legislature power to condemn private lands for public purposes, the Legislature has an inherent right to do so, essential to the due exercise of the powers of government and to the promotion of the public welfare; and this power is practically unlimited, though subject to judicial control, if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken. *Ibid.*

16. *Cities and Towns — Streets—Condemnation—Legislative Powers—Notice—Hearings—Ordinance.*—When the charter of an incorporated town expressly provides that the town authorities may at once enter upon the land and proceed with the proposed improvements, and that the filing of the petition for the purpose of compensating the landowners shall not have the effect of stopping or delaying the work, and just compensation to the owners is properly provided for, it is not necessary to the validity of condemnation proceedings conducted in pursuance of the act that the owners of the land be notified and allowed a hearing before the passage of an ordinance of the town directing the widening and improvement of the street. *Ibid.*

CITIES AND TOWNS—*Continued.*

17. *Cities and Towns — Streets — Condemnation — Assessments—Commence Work.*—It is not required that an appraisement be made of the land condemned by an incorporated town for the use of its public street, before taking the same and commencing work thereon, when the town acts under legislative authority in condemning the street, and there is sufficient provision for compensating the owners of the land. *Ibid.*

18. *Cities and Towns—Streets—Condemnation—Public Use—Questions for Court—Necessity—Legislative Powers.*—When property is condemned for a public street, it is a taking for a public use, as a matter of law; but the question as to the necessity or expediency of devoting the property to the public use is one which is exclusively within the province of the legislative department. *Ibid.*

19. *Cities and Towns — Streets — Condemnation — Shade Trees—Damnum Absque Injuria — Legislative Powers.*—When the charter of a town expressly confers authority to widen a street and to remove any and all obstructions therefrom, and also makes adequate provision for compensation to the owner of the property taken for the purpose, the town acting in good faith and in a careful exercise of the powers conferred is not liable to an abutting owner for removing shade trees from the street in front of his dwelling, for such acts are *damnum absque injuria. Ibid.*

20. *Cities and Towns—Streets—Condemnation—Prior Legislative Acts—Interpretation of Statutes.*—A legislative act passed prior to the enactment of a charter of a town, in respect to condemnation proceedings, is repealed as to all matters in conflict with the charter; and condemnation proceedings for street purposes being had in accordance with the charter provisions are not affected by restrictions placed thereon by the prior act. *Ibid.*

21. *Cities and Towns—Fire Department—Building and Repairing—Permit—Interpretation of Statutes.*—The chief of a fire department, who is also the inspector, in incorporated towns of one thousand inhabitants or more, is authorized to issue a permit to the owner of property to build or to repair buildings thereon. Revisal, secs. 2986, 3010. *S. v. Eubanks,* 628.

22. *Same—Ordinance—Conflicting Requirements.*—When an owner of property in an incorporated town of one thousand or more inhabitants has obtained from the chief of the fire department, or inspector, of that town a permit to repair a build-

CITIES AND TOWNS—*Continued.*

ing on his property, in accordance with the provisions of Revisal, 2986, 3010, he is not subject to indictment for violating an ordinance of the town in not first getting a permit to repair from the board of aldermen of the town; for the town cannot by ordinance make an act illegal which is legal under our statutes. *Quœre:* If there is no conflict between the ordinance and the statute, does *S. v. Tenant*, 110 N. C., 609, apply? *Ibid.*

CLERK OF COURT. See Courts, 4.

COMMINGLING OF GOODS. See Spirituous Liquors, 4.

COMMON LAW. See Interpretation of Statutes, 19, 21; Pleadings, 6; Evidence, 50.

COMMON SOURCE. See Title, 6, 7, 8, 9, 10.

COMPENSATION. See Highways, 2.

COMPETITION. See Contracts, 13.

CONDEMNATION. See Cities and Towns, 15, 16, 17, 18, 19, 20.

CONDITIONS. See Wills, 5, 6.

CONNIVANCE. See Evidence, 73.

CONSENT. See Debt, 2.

CONSIDERATION. See Contracts, 4, 32, 33, 35; Deeds and Conveyances, 53; Insurance, 3; Spirituous Liquors, 3; Usury, 2, 3.

CONSPIRACY. See Attorneys, 2; Contracts, 13.

CONSTITUTION, STATE.

Art. IV, sec. 8. When *habeas corpus* proceedings may be reviewed by Supreme Court. *In re Holly*, 163.

Art. V, sec. 1. Equalization between poll and property tax valuation self-executing. *Kitchin v. Wood*, 565.

Art. X, sec. 8. Residue or remaining interests after homestead exemption can be conveyed. *Davenport v. Fleming*, 291.

Art. XIV, sec. 2. Provisions for uniform systems of schools between white and colored races are mandatory, but between two permissible interpretations of an act, that which upholds the law will prevail. *Bonitz v. School Trustees*, 375.

Art. XIV, sec. 6. Rules 9 and 10, Revisal, sec. 1556, have no application to this section. *Ashe v. Mfg. Co.*, 241.

CONSTITUTION, UNITED STATES.

Art. IV, sec. 2. A recovery of damages for a breach of contract for work done in North Carolina may be recovered here against a foreign citizen. *McDonald v. MacArthur*, 122.

Fourteenth Amendment. A legislative presumption from the evidence must not be unreasonable. *S. v. Griffin*, 611.

CONSTITUTIONAL LAW. See Habeas Corpus, 2, 6; Trusts and Trustees, 5.

1. *Legislative Powers—Constitutional Law—Cities and Towns—Paving Streets—Assessment.*—The Legislature has constitutional authority to authorize a city to improve its streets by creating each street, or a portion thereof, a taxing district, and requiring a prescribed portion of the cost of the paving of said street to be assessed upon the abutting property on each side of the street, according to the frontage of each lot. *Schank v. Asheville*, 40.

2. *Estates—Illegitimates — Inheritance — Prohibited Marriages—Races—Constitutional Law—Interpretation of Statutes.*—The constitutional prohibition (Art. XIV, sec. 6) of marriages between the races does not affect an illegitimate brother's inheriting the estate of an intestate whose father was a negro and mother a white woman; and the fact that the intestate could not be treated "as if born in lawful wedlock," Revisal, sec. 1556, Rules 9 and 10, has no application. *Ashe v. Mfg. Co.*, 241.

3. *Deeds and Conveyances — Creditors — Trustees—Homestead—Residue or Remainder.*—The general power of alienation incident to ordinary ownership of real property exists as to all the residue or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, Article X, section 8, of the Constitution applying alone to the homestead interest, and none other. *Davenport v. Fleming*, 291.

4. *Counties—Boundaries—Legislation—Intent—Interpretation of Statutes—Contracts—Constitutional Law.*—A legislative act reciting that a boundary line between two counties is "indefinite and uncertain," declaring its purpose to establish the line and proceeding then to define and describe the line, clearly indicates the intent to declare and establish what it deems the true boundary line; and the line so established must be taken as the true line without question of its historical correctness; and the questions of private rights and impairments of contracts are not involved. *R. R. v. Washington*, 333.

CONSTITUTIONAL LAW—*Continued.*

5. *Schools—Races—Discrimination — Constitutional Law—Provisions Mandatory.*—The constitutional provisions for a uniform system of public schools, and that the children of the white and colored races shall be taught in separate schools without "discrimination in favor of or to the prejudice of either race," are mandatory, and may be disregarded neither by legislatures nor officials charged with the duty of administering a given law. Constitution of N. C., Art. XIV, sec. 2. *Bonitz v. School Trustees*, 375.

6. *Same.*—An act of the Legislature designating a certain boundary "as a school district for the white race," requiring by construction that the funds to be raised under its provisions shall exclusively apply to the white schools within its boundary and the additional facilities afforded shall only be enjoyed by the white children attending the schools, is unconstitutional. Constitution of N. C., Art. XIV, sec. 2. *Ibid.*

7. *Legislative Acts—Courts—Interpretation—Constitutional Law.* Courts will not adjudge an act of the Legislature invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable. *Ibid.*

8. *Same.*—Between two permissible interpretations of a statute with reference to the Constitution, the one should always be adopted which upholds the law. *Ibid.*

9. *Cities and Towns — Streets—Condemnation—Legislature—Inherent Powers—Constitutional Law.*—While there is no constitutional provision giving the Legislature power to condemn private lands for public purposes, the Legislature has an inherent right to do so, essential to the due exercise of the powers of government and to the promotion of the public welfare; and this power is practically unlimited, though subject to judicial control, if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken. *Jeffress v. Greenville*, 491.

10. *Constitutional Law — Provisions Self-executing — Power of Courts.*—A constitutional provision may be self-executing, and when such is the case, and it is called in question, the courts will so declare it. *Kitchin v. Wood*, 565.

11. *Constitutional Law—Provisions Self-executing.*—It is within the power of those who adopt a constitution to make some of its provisions self-executing. *Ibid.*

12. *Same—Property and Poll Tax—Equation—Legislative Discretion.*—Section 1, Article V of the Constitution of this State,

CONSTITUTIONAL LAW—*Continued.*

requiring that the General Assembly "shall levy a capitation tax on every male inhabitant of the State, which shall be equal to the tax on property valued at $300 in cash," is mandatory and self-executing, and leaves nothing to the discretion of the lawmaking powers. *Ibid.*

13. *Same—Auditor—Forms—Mandamus—Procedure.*—In our Constitution the property tax is the standard of equation, and by it the poll tax must be measured, and when the Legislature has not observed this equation in levying the poll tax and providing machinery for its collection, the error can be corrected by a mathematical calculation; and at the suit of the Governor a mandamus will lie against the Auditor to compel him to prepare the forms for assessing and taxing the polls in accordance with section 1, Article V of the Constitution. *Russell v. Ayer*, 120 N. C., 180, overruled. *Ibid.*

14. *Legislature—Contracts—Fraud — Rational Connection.*—For a presumption from the evidence, created by a legislative enactment, to be valid there must be some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another fact shall not be so unreasonable as to be a purely arbitrary mandate. U. S. Constitution, Fourteenth Amendment. *S. v. Griffin*, 611.

15. "*Due Process*"—*Imprisonment for Debt—Peonage.*—In order for a conviction under Revisal, sec. 3431, it is necessary to show a contemporaneous fraudulent intent and purpose to obtain money under a promise to commence and complete certain work. *Ibid.*

16. *Same — Interpretation of Statutes — Constitutional Law.*—A statute which makes the mere failure to do the work or perform the contract presumptive evidence of fraudulent intent, upon which a person may be convicted and imprisoned, is violative of the Thirteenth Amendment to the Federal Constitution, and is in conflict with our own State Constitution prohibiting imprisonment for debt except in case of fraud. *Ibid.*

17. *Trials—Right of Accused.*—In every criminal prosecution the defendant has the constitutional right to be informed of the accusation against him and to confront his accusers and their witnesses. *S. v. Cherry*, 624.

18. *Same—Absence—Waiver.*—In felonies less than capital and in misdemeanors the defendant has the right to be present at the trial; but this right may be voluntarily waived by him,

CONSTITUTIONAL LAW—*Continued.*

the limitation being that in the case of felonies this waiver may not be made by his counsel unless he expressly authorizes them so to do. *Ibid.*

19. *Same.*—When the defendant is tried for a felony less than a capital one, and voluntarily absents himself, and especially when he has fled the court, his conduct may be construed as a waiver, wherein his presence is not essential to a valid trial and conviction. *Ibid.*

20. *Same—Corporal Punishment — Sentence.*—When the accused is sentenced by the court to work on the roads, it involves and includes corporal punishment, and in such instances it is essential for him to be present for the sentence to be valid. *Ibid.*

21. *Same—Sentence Invalid—Procedure.*—When a valid trial of the accused has been had in his absence, he having waived his right to be present at the trial by having fled the court, and a sentence has been erroneously passed on him in his absence, the judgment of the trial court will be set aside and the cause remanded with direction that a lawful sentence be imposed, the defendant being in custody of the court pending the appeal, and the appeal being regularly presented. The case of *S. v. Keebler*, 145 N. C., 560, cited and distinguished. *Ibid.*

22. *Fertilizers—Tags—Indictment — Qui Tam Actions — Constitutional Law.*—It is not unconstitutional for the Legislature to make an act a misdemeanor and also impose a penalty therefor to be recovered in a *qui tam* action, and Revisal, 3814, 3822, and 3956, making it a misdemeanor and imposing a penalty for the violation of the fertilizer laws, to be given in part to the one who shall sue for and recover the same, are constitutional and valid. *S. v. Oil Co.*, 635.

CONTRACTS. See Liens, 1; Usury, 4, 6, 7, 8, 9.

1. *Equity—Contracts—Specific Performance—Pleadings—Prayers for Relief.*—In a suit for specific performance brought by the vendor, the measure of the kind of relief a court of equity will grant is not necessarily determined or controlled by the relief demanded in the complaint, but by the facts set out in the pleadings. *Councill v. Bailey*, 54.

2. *Same—Measure of Relief.*—Plaintiff in an action against the vendee alleged in his complaint that the latter had entered into a written contract with him for the purchase of certain lands, and he had tendered him a good and sufficient deed

CONTRACTS—*Continued.*

in accordance with the terms and conditions of his contract to convey, and prayed for a judgment for the purchase money, adding a general prayer "for such other and further relief to which he may be entitled: *Held*, sufficient to warrant a judgment for a specific performance of the contract in every respect, including a declaration of a vendor's lien upon the land and a direction for a sale thereof to satisfy the debt. *Ibid.*

3. *Equity — Contracts — Specific Performance — Vendor's Lien— Sales—Removal of Causes.*—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is removable to the county in which the land is situated. Revisal, sec. 419. *Ibid.*

4. *Contracts Written—Parol Evidence—Consideration—Statute of Frauds—Debt of Another — Interests in Lands — Contemporaneous Agreement.*—Plaintiff sold J. certain lands to be paid for at a certain rate per thousand feet of lumber to be cut thereon. The latter sold to defendant, who made a certain cash payment to him in advance, the defendant having no notice that plaintiff owned the land and had reserved a lien on the lumber to secure the purchase price from J. By contracts in writing between plaintiff, defendant, and J., the plaintiff agreed that the payment of the purchase price be made by the defendant from profits made in cutting the lumber at a lower rate per thousand than originally agreed upon with J., which should be paid to plaintiff on the purchase price in behalf of J.: *Held*, evidence was competent to show an oral contract by which defendant was obliged to pay the purchase price for J.; (1) there was a sufficient consideration to support it in the modification of the lien and price per thousand feet of the plaintiff's contract with J., so that defendant could cut the lumber and continue his contract; (2) it was not a promise to answer for the debt of another, Revisal, 974; (3) the agreement was to assume to pay a certain sum of money; it was an executed and not an executory contract to convey an interest in lands required by Revisal, 976, to be written; and, if it had been, the purchaser could not object; (4) it does not alter or contradict the written agreement, but adds a collateral stipulation, and does not appear as having been contemporaneously made. *Rogers v. Lumber Co.*, 108.

CONTRACTS—*Continued.*

5. *Courts—Jurisdiction — Foreign Contracts — Parties — Foreign Defendants — Cause of Action Here.*—When an action is brought by a nonresident plaintiff for breach of a written contract signed in another State, the written contract is not the cause of action, but breach in the performance thereof here, and the plaintiff may maintain his action, as the cause thereof arose in this State. Revisal, sec. 440. *McDonald v. MacArthur*, 122.

6. *Contracts—Acceptance—"Final Estimate" of Work—Fraud in Law—Intent—Instructions—Right of Action.*—The plaintiff was a subcontractor of defendant, which was in turn a subcontractor of M. & Co., to build a railroad, the contract between M. & Co. and the original contractor, which was binding upon plaintiff, providing that the latter's engineer should certify that the work had been performed and accepted by the engineer. It was set up as a defense that the plaintiff could not maintain his action until the certificate had been obtained. It was found by the jury, in response to appropriate issues, that a "final estimate" had been rendered the plaintiff by M. & Co., but was grossly inadequate: *Held,* (1) not error for the court to instruct the jury that if the estimate referred to contained such error of judgment as amounted to a mistake so gross as to necessarily imply bad faith, and to amount to fraud upon the rights of plaintiff, it was unnecessary to show the intention to commit a fraud or to act in bad faith, the court having correctly charged as to what constitutes legal fraud; (2) the jury having found that plaintiff had legal excuse to bring his action, a judgment in his favor will not be disturbed. *Ibid.*

7. *Contracts—Independent Contractor — Requisites — Respondeat Superior.*—One of the vital elements in the relation of independent contractor is that the person for whom the work is contemplated to be done is interested only in the ultimate result of the work; and when it appears that the owner, under the contract relied on to establish this relationship and avoid responsibility for the contractor's negligent acts, furnished important portions of the material for constructing the appliances and the facilities for carrying on the work; that all purchases and prices of materials and supplies were subject to the approval of the architect or superintendent employed and paid by the owners, and that they had the right to select, control, and discharge the labor employed and fix the price of their pay, the facts are insufficient to establish the relationship of independent contractor, and the doctrine of *respondeat superior* applies. *Beal v. Fiber Co.*, 147.

CONTRACTS—*Continued.*

8. *Contracts—Independent Contractor—Evidence.*—In this action, it appearing that there was sufficient evidence for a finding by the jury for plaintiff upon issues as to whether the servant, whose negligent orders caused the injury, was a vice principal, a motion for judgment as of nonsuit upon the evidence upon that ground was properly denied. *Ibid.*

9. *Contracts — Independent Contractor—Negligence—Evidence.*—The servant alleging damages in his action against the master as proximately caused by a negligent order of the latter's vice principal, given while erecting a three-story building, there was evidence tending to show: that the servants were engaged in hoisting heavy timbers, and that the usual way to hoist one of them was to place it beneath a "crab" and hoist on a perpendicular; that on the occasion of the injury the rope was fastened to a timber some distance off, giving it a slant and throwing the line beneath and against a rafter which had just before been raised and which rested on the beam where the timbers were to be placed; that in the performance of his duties the plaintiff was standing near the end of this timber preparing to throw the tag rope to a fellow-servant to draw the rafter to its proper place, when the vice principal, without notice or warning, ordered the men at the "crab" to operate it, causing a "crab" rope beneath the timber near which the plaintiff was standing to knock it or pull it off the plate, from which it fell, to the plaintiff's injury; that the plaintiff was not in a position to see or know what was going on, and had no reason to believe the hoist would be ordered at that unusual time: *Held,* sufficient upon the question of negligence. *Ibid.*

10. *Contracts —Independent Contractor—Negligence—Unexpected Results.*—When in the hoisting of heavy timbers in the erection of a building a negligent order of a vice principal causes an injury to a servant engaged in the work, without fault on the part of the servant, and it appears that the vice principal knew or should have known that the order would be likely to produce an injury to some of the employees, though the vice principal was not in position to see the servant at the time, the master is not excused from liability for the injury because the result was not exactly what might have been expected. *Ibid.*

11. *Timber Deeds—Option—Unilateral Contract—Strict Construction.*—A provision in a timber deed granting an extension of time for cutting and removing the timber from the lands described, upon condition of a certain payment to be made by

CONTRACTS—*Continued.*

the grantee, is unilateral in its obligations, partaking, to some extent, of the nature of an option, in which time is ordinarily of the essence, and should be strictly construed. *Bateman v. Lumber Co.*, 248.

12. *Contract — Sealed Bids—Mail Carrier—-Promise—Tort—Legal Right.*—Conduct, though improper and causing loss to another, does not constitute a tort unless a legal, as distinguished from a moral, right is violated, and the damage conforms to the legal standard, except where it is presumed, as in the case of nominal damages. *Hardison v. Reel*, 273.

13. *Same—Suppress Competition—Conspiracy—Notary Public—Interpretation of Statutes.*—One who makes a sealed bid required for the contract of carrying the United States mails cannot sustain an action for damages against the notary public before whom the bond was justified, in accordance with the Federal statute, upon the ground that he requested the notary not to divulge the amount of his bid, and the notary, knowing the amount, underbid him and obtained the contract. (1) There has been no violation of a legal duty alleged or shown; (2) had the notary promised not to compete with plaintiff in the biddings, it would, as an agreement to suppress competition, have been against public policy, the notary being qualified to bid under the circumstances; (3) the fact that defendant acted as a notary in his official capacity would not make him liable upon the breach of promise, if one was implied, to do an unlawful act; (4) a promise of the kind sued on is expressly condemned by the Federal act in question. *Ibid.*

14. *Contracts—Mail Carrier—Right to Reject Bids—Damages Consequential.*—Under the Federal statute regulating the bidding by private parties for a contract to carry the United States mail, the department of the Government reserves the right to reject any and all bids if, in its judgment, the good of the service requires it. Hence, damages are too contingent to be recoverable by one in an action against a notary before whom his bond was justified, as required by the statute, which is based upon the allegation that the notary used the information he thus acquired to underbid the plaintiff and obtained the contract. The plaintiff may or may not have received the contract. *Ibid.*

15. *Deeds and Conveyances — Contracts—Interpretation—Intent—Entire Instrument.*—In the interpretation of a deed or contract, the intent of the parties, as embodied in the entire in-

CONTRACTS—*Continued.*

strument, must prevail, and each and every part must be given effect, if it can be done by any fair and reasonable intendment. *Brown v. R. R.*, 300.

16. *Same—Railroads — Material Delivered — Accessibility—Additional Work—Damages.*—In an action to recover a balance alleged to be due the plaintiff under his contract with defendant to build a railroad trestle, and for damages for failure to supply material stipulated for in the manner provided for in the contract, it appeared from the contract sued on that the defendant agreed "to deliver all material for the trestle on cars or on the ground within 300 feet of the trestle, and to be furnished in such manner and time as not to impede the plaintiff (contractor) in the performance of his part of the contract": *Held*, (1) the contract contemplated that defendant should deliver the material within 300 feet of the work, at a point from which a haul could be made to the best advantage, having reasonable regard to the nature of the ground and the attendant facts and circumstances; (2) that under a contract of this character and extent, requiring completion within a specified time, delivery of the material within the specified distance from the work, but across a slough, requiring an additional haul of half a mile, was not such delivery by defendant as called for in the contract, and for such additional work the plaintiff was entitled to recover extra compensation. *Ibid.*

17. *Contracts—Breach—Appliances—Definite Rental—Measure of Damages.*—When a building or a given machine is shown to have a definite rental value, and the opportunity for obtaining it is lost by another's breach of contract, the rental value of the machine usually affords a better basis for the ascertainment and award of damages, subject to the rules that the damages must have been in the reasonable contemplation of the parties and capable of ascertainment with a reasonable degree of certainty. *Rocky Mount Mills v. R. R.*, 119 N. C., 693, holding that interest on the value is the proper measure of damages, and other like cases cited and distinguished. *Ibid.*

18. *Same—Railroads—Pile Drivers.*—In an action by plaintiff to recover damages of the defendant railroad alleged by breach of contract requiring the latter to supply at certain places, under the terms of the contract, material for the former to build a trestle, there was a confirmation by the lower court of the referee's findings, upon evidence to support them, that by reason of such delay plaintiff's pile driver remained idle

CONTRACTS—*Continued.*

for thirty days at a net rental value of $2.50 per day, and this was not infrequently rented by plaintiff for a definite sum: *Held,* the measure of damages was the rental value of the pile driver for the time it remained idle through defendant's default, under the contract. *Ibid.*

19. *Interpretation of Statutes — Common Law — Contracts.*—The purpose of Revisal, sec. 2107, was to protect a married woman from the influence and control which the husband is presumed to have over her by reason of the marital relation, by an adjudication of the probate officer as to her interests; and the requirements imposed by this section are not dispensed with under the provisions of Revisal, sec. 2016, giving a lien on her lands for labor done, etc., when the lienor is her husband, though it is otherwise as to her written consent in dealing with a stranger, under Revisal, sec. 2094. *Kearney v. Vann,* 311.

20. *Married Women—Separate Realty—Husband and Wife—Contracts Between—Notes.*—The fact that a wife executed a note to her husband for work, etc., done by him on her land, does not affect the question of a lien filed by the husband therefor, as the presumption is that the wife executed the note under the direction of the husband. *Ibid.*

21. *Cities and Towns — Streets — Easements — Value — Abutting Owners—Reversion—Contracts—Interpretation of Statutes.*—The plaintiff, a railroad, and a terminal company, desirous of connecting their property, entered into an agreement with a city that it should agree to the procurement of a legislative act authorizing the condemnation of a street to effectuate that purpose, the former corporations agreeing to pay the city for the easement and to build certain improvements on their adjoining lands; the act passed according to this agreement providing that under certain named conditions the street should revert to the city for public purposes. The plaintiff denied the right of the city to compensation for the easement over the street, upon the ground that, as abutting owners, they held the fee therein: *Held,* (1) a city holds the easement in its streets in trust for all its citizens, and was entitled to compensation from the plaintiffs; (2) here it was entitled to compensation under an express agreement relative to the passage of the act; (3) the act itself recognized the value of the easement in the street to the city, and provided for the reversion under named conditions. *R. R. v. Wilmington,* 331.

22. *Timber Deeds—Contracts—Trees Under Size — Trespass.*—An action against the grantee in a timber deed, or his as-

CONTRACTS—*Continued.*

signees, for the cutting of trees of less dimension than those specified in the deed is virtually one for trespass on the land in wrongfully cutting and removing timber therefrom. *Jenkins v. Lumber Co.*, 355.

23. *Timber Deeds — Contracts — Time for Cutting—Expiration—Ownership.*—Trees not cut by the grantee or his assignees under a timber deed within the period of time therein fixed for the purpose become the property of the owner of the land. *Ibid.*

24. *Same—Offset.*—The grantee in a timber deed may not offset damages to the land sustained by the owner, caused by his wrongfully cutting trees under the size specified in his contract, by the value of the trees of the specified size he has left on the land after the expiration of the period of time allowed for his cutting them, as such have then become the sole property of the owner. *Ibid.*

25. *Timber Deeds — Contracts — Trees Under Size — Measure of Damages.*—The measure of damages in an action against the grantee in a timber deed for the wrongful cutting of trees under the size specified in the contract is the difference between the value of the land before and after the wrong was committed, or the amount by which the land was diminished by the trespass. *Ibid.*

26. *Mortgagor and Mortgagee — Contracts — Private Sale — Purchaser—Purchase Price.*—One who purchases land at a certain price, on which there was a mortgage, at a private sale from the mortgagee, who cancels his mortgage and thus gives a clear title to the land, is required to pay the price agreed upon without reference to any agreement between the mortgagor and mortgagee as to what part of the difference between the amount of the mortgage and the purchase price each was to receive; and the fact in this case, that the mortgagee, who negotiated the sale, received $200 more than his mortgage debt has no bearing upon the matter. *Wooten v. Borden*, 370.

27. *Lands — Lessor and Lessee—Hotel—Sewerage—Quiet Enjoyment—Implied Covenant.*—A lease of a hotel equipped with bath tubs, closets, etc., in a city with a sewerage system, etc., carries with it an implied covenant of quiet enjoyment extending to a proper sewerage connection during the term of the lease, unless the lessee has taken the property with notice or knowledge that it was otherwise. *Huggins v. Waters*, 443.

28. *Lands—Leases—Quiet Enjoyment—Covenant—Trespasser.*—A covenant of quiet enjoyment implied from a lease of lands,

CONTRACTS—*Continued.*

etc., does not extend to acts of trespassers or wrongdoers, but only to those whose rights are superior to the lessor. *Ibid.*

29. *Same—Pleadings—Inconsistent Pleas—Election—Procedure.*—The plaintiff leased a hotel equipped with baths, closets, etc., working with sewerage connections in a city having a sewerage system, and, having entered into possession, found that the sewer connected with the hotel was a private one traversing the lands of an adjoining owner. In an action against his lessor and the adjoining owner he alleged, as to the former, a breach of an implied covenant of quiet enjoyment, and that the latter maliciously, wantonly, and wrongfully stopped up the sewer pipe, to his damage, etc. The cause of action as to both defendants being damages arising from stopping the sewer: *Held,* (1) the wrongful acts alleged as against the adjoining owner were those of trespass or wrongdoing, and inconsistent with the allegations of breach of covenant on the part of the lessor; (2) the action was remanded to the Superior Court so that the plaintiff may elect the cause of action he will prosecute, and amend his complaint accordingly. *Ibid.*

30. *Deeds and Conveyances—Title—Common Source—Contract of Purchase—Rule of Convenience.*—When the plaintiff and defendant in an action to recover lands deduce their title from a common origin, the one by deed and mesne conveyances and the other under an executory contract of purchase, neither is allowed to deny the title in the common source, for between them the elder is the better title and must prevail unless the adverse party can show a better outstanding title which he has acquired. *Bowen v. Perkins,* 449.

31. *Same — Parol Agreement — Statute of Frauds.*—The plaintiff claimed title to the lands in controversy by deed and mesne conveyances, and defendant claimed under an alleged parol contract of purchase made by his lessor with one under whom plaintiff claimed in his chain of title: *Held,* the statute of frauds was not involved, and evidence of the parol contract was admissible to show that defendant claimed title from the same source as plaintiff. *Ibid.*

32. *Contracts—Guarantor of Payment—Consideration—Statute of Frauds.*—In an action against a guarantor of payment of a debt of another it is not necessary, under the statute of frauds, that the consideration for the promise be contained in the writing. *Supply Co. v. Person,* 456.

33. *Same—Forbearance to Sue.*—A binding written contract to forbear suit on a valid claim, for a definite time, or ex-

CONTRACTS—*Continued.*

pressed in language that the law would interpret as a reasonable time, constitutes a sufficient consideration to bind a guarantor to the payment of a debt of another. *Ibid.*

34. *Same—Express Agreement—Promise.*—When at the instance or request of another, and on promise of payment by the latter, a creditor forbears to sue his debtor for a specified time, the one so promising is liable as a guarantor of payment. *Ibid.*

35. *Same.*—In an action brought to recover of defendant a certain amount claimed to be due by him as a guarantor of payment of the debt of another, there was undisputed evidence of a correspondence between the parties, in which it appeared that defendant, after repudiating liability, wrote the plaintiff that "Just as soon as the dry-kiln is completed I will see that your bill is paid." The dry-kiln was completed before suit was brought, and acting upon the promise the plaintiff desisted and forbore to sue his debtor with reference to the amount in controversy: *Held*, (1) the promise was in writing, and sufficient under the statute of frauds; (2) the forbearance to sue was a sufficient consideration; (3) the defendant was liable for the debt as a guarantor of payment. *Ibid.*

36. *Contracts—Breach—Goods Sold—Damages—Admissions—Burden of Proof—Delivery—"Ready and Willing."*—In an action to recover for a balance of goods sold under a contract, the answer admitted that defendant had received and paid for a part of the goods, alleging that he did so upon plaintiff's promise and assurance that the remainder would be of a certain standard quality: *Held*, to recover the contract price of the balance of goods, refused upon the allegation that they did not come up to the standard fixed by the contract, the plaintiff must show that it was ready and willing to deliver them, which was denied; and plaintiff's motion for judgment upon the admission in the answer, on the ground that the defendant could not refuse to accept the balance of the goods on account of defects in the goods already received, was properly denied. *Cotton Mills v. Hosiery Mills*, 462.

37. *Contracts — Breach — Goods Sold — Damages — Defects—Evidence.*—The defense, in an action for damages on defendant's refusal to accept certain yarns, sold under contract, being that the yarns were defective, it was competent to show by plaintiff's correspondence in this case matters relating to such defects, in corroboration of defendant's wit-

CONTRACTS—*Continued.*

ness; and, also, in reply to plaintiff's evidence that yarns of the character refused by defendant were sent to plaintiff's other customers without complaint made. *Ibid.*

38. *Costs—Recovery—Several Causes of Action—Interpretation of Statutes.*—The matter of taxing costs against an unsuccessful litigant is regulated by statute, and thereunder the full cost should be taxed against a defendant when the plaintiff recovers in but one of several causes of action set out in his complaint. Revisal, sec. 1249. *Ibid.*

39. *Contracts — Sale of Fertilizer — Damages to Crop—Vendee's Duty—Knowledge.*—The plaintiff brings his action to recover damages to his crop arising from a breach by defendant of its contract to furnish him with a certain quality of cottonseed meal to be used as a fertilizer, and acknowledged that he discovered the defects in time to have procured other fertilizer of the kind required, which he could have obtained: *Held*, it was incumbent upon plaintiff to avoid any damages arising from defendant's failure to properly perform his contract, and he could not recover the damages sought in this action. *Carson v. Bunting*, 530.

40. *Judgments—Payments—Motions to Enter Satisfaction—Lands —Parol Contracts—Statute of Frauds.*—Upon a motion to enter satisfaction of a judgment under Revisal, sec. 579, a defendant may not set up his parol executory agreement to convey lands to plaintiff for that purpose, such not being in the purview of the statute and not enforcible by him under the statute of frauds. *Brown v. Hobbs*, 544.

41. *Railroads—Discrimination—Rebates—Contracts — Tramroads.* From the uncontradicted evidence in this case it appears that plaintiff, the owner of a tramroad, bought lumber and timber from third parties to be delivered at defendant's railroad under contract with the latter that he be allowed ½ cent per 100 pounds for hauling it over the tramroad to its junction with railroad: *Held*, there being no allegation or evidence tending to show that the rate charged over plaintiff's tramroad was excessive or that the transaction was a mere device to evade the statute against rebating, or that it was a discrimination in any manner, the plaintiff's charge for the hauling was a valid one, which he could recover against the defendant railroad company. *Wilcox v. R. R.*, 582.

42. *Negligence—Release—Agreeing Mind—Questions for Jury.*—In this case there was evidence tending to show that defendant

CONTRACTS—*Continued.*

obtained a release from plaintiff for damages in consideration of $10 and the payment of plaintiff's drug and doctor's bill, soon after the injury complained of was inflicted, while the latter was in bed suffering from the effects of the injury and under the influence of drugs: *Held*, it was a question for the jury to determine whether the plaintiff at the time of the execution of the release had sufficient mental capacity to understand its nature and effect. *Morarity v. Traction Co.*, 586.

43. *Contracts — Failure to Perform — Dependable Conditions.*—A party to a contract may elect to treat it as ended upon the failure and inability of the other party to perform a dependent stipulation therein and which extends to the entire measure of the obligation. *Wildes v. Nelson*, 590.

44. *Same—Patents—Termination of Contract — Election—License.* When it appears from a written contract entered into between a patentee and another that the purpose of the former was solely to arrange for the manufacture and sale of the patented implement, for which he was to receive a certain commission on the sales, the right of the latter under the contract is dependent upon the fulfillment of the obligations imposed upon him, and upon his failure and inability to perform these conditions the patentee may regard the contract as at an end. *Semble*, in this case, the contract was one of license and not of assignment. *Ibid.*

45. *Contracts—Failure to Perform — Termination—Election—Corporations—Receivers.*—The receiver of an insolvent corporation can enforce no right under a contract previously entered into by the corporation and a patentee, wherein the rights of the corporation are made dependent upon the manufacture, advertisement, and sale of the patented article and payment to the patentee of a commission or royalty on the sales, when admittedly the corporation had failed to perform the conditions imposed on it and was unable to do so. *Ibid.*

46. *Legislature—Contracts — Promise to Work—Advances—Intent —Fraud.*—To convict under Revisal, sec. 3431, for obtaining money upon and by color of any promise to begin any work and unlawfully and willfully failing to commence or complete the work according to the contract, without lawful excuse, it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. *S. v. Griffin*, 611.

CONTRACTS TO CONVEY. See Deeds and Conveyances, 2, 4.

CONTRIBUTORY NEGLIGENCE. See Negligence.

1. *Public Inns — Guests — Contributory Negligence — Evidence— Questions for Jury.*—In this case there was evidence tending to show that the plaintiff, a guest at defendant's hotel, was shown into a bedroom wherein there was a defective gas fixture by which a light was furnished to the occupant, by reason of not having a safety-pin to prevent the turning of the key all the way around, and that the gas fixture was not safe in consequence; that before retiring for the night the plaintiff discovered the absence of this safety-pin. but turned the key to where it should have stopped, and could smell no gas escaping, and thereupon he retired, but was injured by asphyxiation that night when asleep: *Held*, a motion to nonsuit was properly denied, there being evidence of defendant's negligence; and it was for the jury to say whether, according to the rule of the prudent man, the plaintiff was guilty of such contributory negligence as would bar his recovery. *Patrick v. Springs*, 270.

2. *Same—Dangerous Machines—Repair—Obvious Danger — Rule of the Prudent Man—Contributory Negligence—Questions for Jury.*—The plaintiff, an employee 19 years of age, was changed, under his protest, from working at a harmless machine to a dangerous one, the latter machine being badly out of repair and containing revolving knives run by machinery. The plaintiff showed his superior that the result of the work upon the machine was unsatisfactory, and was instructed to do the best he could; also, to "get a monkey-wrench and see if he could raise the bed back to its proper place." The bed having slipped down, left the revolving knives exposed, and while the plaintiff was endeavoring to raise the bed with a worn monkey-wrench, the wrench slipped from a nut he was working on, and his fingers were cut off by the revolving knives: *Held*, (1) it was negligence for the master not to have instructed the servant in the operation of the dangerous machine; and in ordering him to repair it without instructions as to stopping it, etc.; (2) there being no evidence that plaintiff knew of the danger in attempting to repair the machine, the danger was not so obvious that a reasonably prudent man would not have undertaken it, and a judgment of nonsuit was improperly allowed. *Walters v. Sash and Blind Co.*, 323.

3. *Master and Servant—Independent Duty to Servant—Contributory Negligence—Proximate Cause—Issues.*—Where a negligent default has been established against an employer by

CONTRIBUTORY NEGLIGENCE—*Continued.*

reason of some breach of an arbitrary and independent duty which he owes to his employee, as in failure to supply "machinery known and approved and in general use," a disobedience of instructions on the part of the employee and its effects are to be considered and determined, as a rule, on the issue as to contributory negligence, involving also the question of whether such disobedience is the proximate cause of a given injury. *Flanner v. Cotton Mills*, 394.

4. *Master and Servant—Defective Machine—Contributory Negligence — Evidence — Instructions.*— In an action by an employee to recover damages of his employer for a personal injury received in operating a planing machine in defendant's mill, there was evidence tending to show that the machine had revolving cogs operated by steam power, which were left unboxed and exposed, and that a feed gear or shift by which the power was applied and shut off was defective, all of which had been called to defendant's attention. The plaintiff admitted the necessity of shutting off the power before attempting to relieve a choked condition of the machine, and there was contradictory evidence as to whether he waited, after shutting off the power, until the wheels stopped revolving, before attempting to clear the machine, wherein the injury was inflicted: *Held*, the conflict of evidence presented an issue of fact to the jury, and it was error to refuse to instruct the jury that plaintiff was guilty of contributory negligence, should they find that he placed his hand in the machine before the cogs stopped revolving, after he had shut off the motive power, and was thereby injured. *Bryan v. Lumber Co.*, 485.

5. *Railroads — Crossings—Obstructed View—Contributory Negligence—Exceptions.*—A person in attempting to cross a railroad track must both look and listen when he gets within the zone of danger, and while his failure to do so ordinarily bars his recovery for an injury received by reason of his attempting to cross, yet attendant circumstances may so qualify this obligation as to require the question of contributory negligence to be submitted to the jury. *Wolfe v. R. R.*, 569.

6. *Master and Servant — Contributory Negligence — Evidence — Negligence.*—In an action for damages by one employed by a railroad company as a brakeman, alleged on account of his acting in obedience to instructions in getting on defendant's moving freight train: *Semble*, the evidence relied on to excuse him from contributory negligence, under the rule of the prudent man, would also exonerate the defendant from the charge of negligence. *Wiggins v. R. R.*, 577.

CORPORAL PUNISHMENT. See Constitutional Law, 20.

CORPORATIONS. See Electricity, 1, 2, 3.

1. *Corporations — Preferred Stock—Debtor and Creditor—Assets —Prorate.*—The issuance of preferred stock by a corporation does not create the relation of creditor and debtor between the owner thereof and the corporation so as to entitle him to prorate with the creditors in the assets of an insolvent corporation in the hands of a receiver. *Power Co. v. Mills Co.*, 76.

2. *Deeds and Conveyances—Seal.*—Where a corporate act must be executed by an instrument under seal and the corporation had adopted a common seal, the corporation speaks through and by its seal. *Withrell v. Murphy*, 82.

3. *Same—Corporate Act — Evidence—Interpretation of Statutes.* When it does not appear from the probate of a corporation's deed to lands that the seal affixed is the common seal of the corporation or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with Revisal, sec. 1005, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. *Ibid.*

4. *Same—Official Acts.*—A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledge the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. *Ibid.*

5. *Corporations—Receivers — Status of Property—Interpretation of Statutes.*—Upon the appointment of a receiver of an insolvent corporation, all the real and personal property, etc., wherever situated, vests in the receiver (Revisal, sec. 1224), "impressed with all existing rights and equities, and the relative rank of claims and standing of liens remains unaffected by the receivership." *Ibid.*

6. *Deeds and Conveyances — Mortgages — Assignments — Seal—Title—Trusts and Trustees.*—The grantee in a mortgage deed assigned the deed under a writing thereon as follows: "For value received the F. and M. Bank hereby bargains and sells to M., his heirs and assigns, this mortgage and all its rights, title, and interest to the property therein, together with all rights and powers contained in said mortgage, without recourse to said bank." The assignment was signed by the proper officers of the bank, and it is *Held*, (1) lacking the

CORPORATIONS—*Continued.*

seal, the assignment could not operate as a conveyance by the corporation; (2) if with the corporate seal, the assignment was solely of the mortgage deed, the written instrument of conveyance, and the security it affords to the holding of the debt, and it did not convey to the assignee the legal title subject to the trusts and powers contained in the mortgage. *Morton v. Lumber Co.*, 336.

7. *Corporations — Insolvency — Application—Creditors.*—When a corporation is insolvent or in imminent danger of insolvency, and especially when its business operations have practically been suspended owing to its financial condition, the court may, upon proper application of a creditor or stockholder, appoint a receiver of its assets to be administered for the benefit of all of its creditors. Revisal, secs. 847, 1219, 1203. *Silk Co. v. Spinning Co.*, 421.

8. *Same—Trust Fund.*—In its action for the recovery of a certain plant or machine, damages for its detention and for a receiver of the defendant company, the plaintiff alleged that the defendant falsely represented its capital stock to be $50,000 and had failed in the performance of its contract of purchase of the machinery to increase its capital stock, as agreed upon, by the issuance of common and preferred stock, of which the plaintiff was to receive a certain part as payment, the title to the machinery to remain in the plaintiff vendor until the agreement was performed. Upon the pleadings and proof his Honor found as a fact that the plaintiff had shown an apparent right to the machinery in question and that it was or should be in defendant's possession, and that the machinery had a specified value, and the rents and profits thereof were in danger of being lost; that the defendant was insolvent and indebted to the plaintiff and others: *Held*, the creditors were entitled to have the defendant corporation's assets preserved and administered for their benefit, and that a receiver for that purpose was proper. *Ibid.*

9. *Corporations — Insolvency—Receivers—Application—Creditors—Definition.*—Any one who has a debt or demand against an insolvent corporation upon contract, express or implied, comes within the meaning of the word "creditor," used in the statute, and may apply to the courts and obtain, in proper instances, the appointment of a receiver for the corporation. *Ibid.*

10. *Foreign Corporations — Insolvency—Receivers—Property Here—Procedure.*—An insolvent corporation, with its property or

CORPORATIONS—*Continued.*

plant located in this State, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another State, approving *Holshouser v. Copper Co.*, 138 N. C., 248. *Ibid.*

11. *Corporations — Insolvency — Receivers — Pleadings — Relief Granted.*—It appears in this case from the facts alleged in, and the general scope of, the complaint, that the relief should not be restricted to the exact prayer of the complaint, but should be extended so as to afford relief which is commensurate with the averments, under the familiar rule that it is not the language of the prayer, but the allegations of the pleading that determine the extent of the relief to be granted. *Ibid.*

12. *Contracts—Failure to Perform—Termination—Election—Corporations—Receivers.*—The receiver of an insolvent corporation can enforce no right under a contract previously entered into by the corporation and a patentee, wherein the rights of the corporation are made dependent upon the manufacture, advertisement, and sale of the patented article and payment to the patentee of a commission or royalty on the sales, when admittedly the corporation had failed to perform the conditions imposed on it, and was unable to do so. *Wildes v. Nelson*, 590.

COSTS. See Courts, 4, 13.

COTTON-SEED MEAL. See Penalty Statutes, 7, 8.

COUNTIES.

1. *Counties—Boundary Line — Location — Legislative Powers.*—The location of the true boundary line between counties raises a political question, and the power is vested in the Legislature to determine a disputed line. *R. R. v. Washington*, 333.

2. *Same—Intent—Interpretation of Statutes—Contracts—Constitutional Law.*—A legislative act reciting that a boundary line between two counties is "indefinite and uncertain," declaring its purpose to establish the line and proceeding then to define and describe the line, clearly indicates the intent to declare and establish what it deems the true boundary line; and the line so established must be taken as the true line without question of its historical correctness; and the questions of private rights and impairments of contracts are not involved. *Ibid.*

COUNTIES—*Continued.*

3. *Counties — Boundary Line — Location — Legislative Powers—Courts.*—Since the institution of this action to apportion to Washington and Tyrrell counties taxes on a railroad bridge over Albêmarle Sound from one county to the other, a legislative enactment declaring the line to be in the middle of the sound is held as controlling the question. *Ibid.*

4. *Counties—Taxation—Conflicting Demands — Injunction — Parties—Misjoinder—Removal of Causes—Discretion of Court—Procedure.*—This action involves a controversy between two counties as to which is entitled to assess taxes upon the same personal property, consisting of solvent credits. The sheriff of one county seized the property in the hands of an administrator as that of a deceased resident, and the sheriff of the other claims it as that of one of its citizens to whom the deceased is alleged to have duly assigned it before June 1. The administrator of deceased and the alleged assignee seek to enjoin the sheriffs of both counties from selling the property for taxes, offering to pay into court the taxes on the larger amount assessed: *Held,* (1) the main relief is that by injunction, and the injunction should be continued; (2) the pleadings relate to one transaction, and there is no misjoinder of parties; (3) the plaintiffs could elect to sue in either county; (4) the question of the removal of the action in effect involved the contest of the two counties over a fund and within the discretion of the trial judge; (5) the right of either county to the tax depended upon the place of residence of the true owner, a question of fact for the jury under conflicting evidence; (6) the plaintiffs should not be required to pay the tax and sue the respective counties to recover it back; (7) the remedy by injunction is the proper one. Revisal, secs. 821, 2855. *Sherrod v. Dawson*, 525.

COURSE AND DISTANCE. See Deeds and Conveyances, 41, 44.

COURTS. See Jurisdiction; Removal of Causes, 2.

1. *Appeal and Error—Courts—Expression of Opinion—Interpretation of Statutes.*—In this case the judge in charging the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff bases the eleven thousand and some odd dollars": *Held,* this was not an expression of opinion prohibited by Revisal, 535, it not appearing that the expressions used were pertinent to the issue, or were prejudicial to appellant, or corroborative of an alleged error based upon his admitted ignorance, or failure to comprehend plaintiff's claim, upon which the law was incorrectly charged. *McDonald v. MacArthur*, 11.

COURTS—*Continued.*

2. *Courts—Treaties—Grants — Official Boundaries — Judicial Notice—Evidence.*—The Meigs and Freeman line having been run by the Federal Government in obedience to the treaty power vested in it by the Constitution of the United States, and expressly recognized by the Legislature of this State, the courts will take judicial notice of its existence; but its physical location is the subject-matter of proof. *Land and Timber Co. v. Kinsland*, 79.

3. *Insurance Orders — Restrictive Rights — Tribunals—Courts.*—A member of an insurance order is not bound by any agreement or stipulation restricting his rights to recover sick benefits to the determination of the tribunals of the order, and may enforce them in the courts without first resorting to the tribunals thereof. *Kelly v. Trimont Lodge*, 97.

4. *Clerk of Court—Fees—Cost—Interpretation of Statutes.*—The fees for continuances of cases allowed to the clerk of the Superior Court by Revisal, sec. 2773, must be for such continuance as is made by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial. *Luther v. R. R.*, 103.

5. *Reference Agreed—Power of Court—Procedure.*—The court cannot set aside the method of trial agreed upon by the parties to a consent reference. *Rogers v. Lumber Co.*, 108.

6. *Reference Compulsory—Exceptions — Power of Court.*—When either party to a compulsory reference reserves his right to a jury trial, the judge can set the reference aside and submit the case to the jury upon proper issues. *Ibid.*

7. *Same—Issues.*—The judge is not precluded by the issues formulated by the party excepting to a reference; he should submit the issues properly raised by the pleadings. *Ibid.*

8. *Associations—Churches — Powers — Trustees—Appointment—Parties—Court's Discretion.*—At a meeting regularly held by a voluntary association of churches, trustees were appointed for a school chartered by the association. At the same time, but at a different place, there was a meeting called by the officers of the association, when and where other and conflicting trustees were appointed. The question at issue being which set of trustees were the ones legally qualified to act, it was *Held*, (1) that the trustees appointed at these meetings were the real parties in interest, and it was not error for the trial judge in his discretion to order them to be made parties, so that the matter might be decided upon its

COURTS—*Continued.*

merits (Revisal, 507); (2) no appeal lies from the refusal of a motion to dismiss, and an entry of appeal not perfected is treated as an exception on appeal from the final judgment. *Kerr v. Hicks*, 265.

9. *Counties — Boundary Line — Location — Legislative Powers—Courts.*—Since the institution of this action to apportion to Washington and Tyrrell counties taxes on a railroad bridge over Albemarle Sound from one county to the other, a legislative enactment declaring the line to be in the middle of the sound is held as controlling the question. *R. R. v. Washington*, 333.

10. *Application for License—Supreme Court—Investigation—Affidavits—Defamation—Absolute Privilege.*—Affidavits filed in the Supreme Court in response to a citation by that Court and used while considering the question of granting a license to an applicant to practice law are absolutely privileged, and no action for damages will lie because the affidavits contained defamatory relevant matter affecting the character of the applicant. *Baggett v. Grady*, 342.

11. *Same—Conspiracy—Evidence.*—The Supreme Court has complete jurisdiction over the granting of licenses to practice law; and when the Court has under consideration the question of granting a license to an applicant, and issues a citation to certain persons to appear, and in compliance therewith they do appear and file affidavits relevant to the inquiry and affecting the character of the applicant, no evidence of conspiracy is shown, the defamatory matters contained in the affidavits being absolutely privileged, and called for by the Court in the progress of the inquiry. *Ibid.*

12. *Witnesses—Privileged Communication—Responsive Answers—Objections and Exceptions.*—It is the province of counsel to object to irrelevant matter, and a responsive answer by a witness to a question of a defamatory nature, when no objection is made, or, being made, is overruled, cannot make the witness liable in an action for damages. *Ibid.*

13. *Costs—Recovery—Several Causes of Action—Interpretation of Statutes.*—The matter of taxing costs against an unsuccessful litigant is regulated by statute, and thereunder the full cost should be taxed against a defendant when the plaintiff recovers in but one of several causes of action set out in his complaint. Revisal, sec. 1249. *Cotton Mills v. Hosiery Mills*, 462.

14. *Penalty Statutes—Judicial Notice—Pleadings—Proof.*—Section 3956 of the Revisal imposes a penalty for the violation of

COURTS—*Continued.*

the law by those selling fertilizers, for protection to the farmers in their use, and, being a public statute, the courts will take judicial knowledge thereof and permit a recovery thereunder, though not specially pleaded, when there is allegation and proof that section 3957, relating to the sale of cotton-seed meal as a fertilizer, has been violated. *Carson v. Bunting*, 530.

15. *Appeal and Error — Verdict Set Aside — Discretion — Reason Given.*—Whatever may have been the reason given by the trial judge in setting aside a verdict, no appeal will lie when it actually appears that he had set it aside as a matter within his discretion. *Dowdy v. Dowdy*, 556.

16. *Appeal and Error — Appeal Dismissed — Decision — Supreme Court's Discretion.*—Though an appeal be dismissed by the Supreme Court as premature, the Court may, in its discretion, consider the questions presented. *Ibid.*

17. *Constitutional Law — Provisions Self-executing — Power of Courts.*—A constitutional provision may be self-executing, and when such is the case, and it is called in question, the courts will so declare it. *Kitchin v. Wood*, 566.

18. *Ejectment — Defendant's Bond—Receiver—Power of Court—Supreme Court—Supersedeas Order—Practice.*—Revisal, 453, requiring defendant in ejectment to give bond before putting in a defense to the entire action, does not abridge the power of the court to appoint a receiver to secure the rents and profits; and while the Supreme Court, under its general power of "supervision and control over the proceedings of the Superior Court," might exercise the extraordinary right to grant a *supersedeas* to vacate an order appointing a receiver and permit defendant to give bond, it will not do so except under unusual circumstances, as when there has been a gross abuse of discretion by the trial judge. *Arey v. Williams*, 610.

19. *Indictment — Common-law Misdemeanors — Superior Courts—Jurisdiction.*—When an indictment charges an offense indictable at common law it is within the exclusive jurisdiction of the Superior Court. *S. v. Faulk*, 638.

20. *Same—Statutory Offense—Justice of the Peace.*—An indictment charging that the defendant in certain public highways, in the presence of divers persons passing and repassing, "did curse in a loud voice and use profane language for the space of five minutes (reciting the profane words), with great disturbance and to the common nuisance of the good

COURTS—*Continued.*

citizens of the State," states the offense of a common-law nuisance, and is within the jurisdiction of the Superior Court, notwithstanding he may have been indicted under a statute relating to a certain county whereunder conviction may have been had of a less offense, made a misdemeanor by the statute, cognizable before a justice of the peace in that county. *Ibid.*

21. *Same.*—An act relating to a certain county, making it "unlawful for any person to act in a disorderly manner by being drunk or using profane, obscene, or boisterous language on any public road" therein, does not oust the jurisdiction of the Superior Court of an indictment going further in its charges, and stating a common-law misdemeanor, though conviction may have been had under the statute. *Ibid.*

22. *Court Sittings — Proceedings — Attorneys — Notice.*—It is the duty of attorneys in a cause to take notice of the regular sittings of the Superior Court, and not that of the trial judge to send for them when they are absent, in considering their case, except "for some unusual reason," within the meaning of Rule 27 of the Supreme Court. Revisal, sec. 1541. *S. v. Denton*, 641.

23. *Same — Instructions — Absence of Attorneys — Discretion of Court.*—Whether it is the duty of a judge of the Superior Court to send for counsel in a case while considering it, at a regular sitting in term, for the "unusual reason" required by Rule 27 of the Supreme Court, is a matter within the discretion of the trial judge, and will not be considered on appeal. *Ibid.*

24. *Same.*—When a case has been given to the jury, and the jury requests the trial judge to instruct them upon the law as to certain of its phases, it is not error for the court to comply with the request of the jury, in the absence of counsel, when done at a regular sitting of the court in term. *Ibid.*

COVENANT. See Lessor and Lessee, 1, 2, 3.

COVENANTOR. See Deeds and Conveyances, 9.

CREDITORS. See Homestead, 2, 3, 4; Liens, 3.

CROSSINGS. See Railroads, 22, 24, 25.

DAMAGES. See Measure of Damages.

1. *Railroads—Damages—Release — Mental Incapacity—Evidence —Conductor—Nonsuit.*—In this case, reported 151 N. C., 231, it was held necessary to set aside plaintiff's release for dam-

DAMAGES—*Continued.*

ages for personal injuries sought in his action, for plaintiff to prove that defendant had notice of his mental incapacity at the time. The evidence on this appeal, in addition to that on the former appeal, tends to show that certain letters indicating his mental soundness, though signed by plaintiff, were written with the aid of his wife and others in view of having him continued in his occupation as defendant's conductor, but this fact was withheld from defendant; there was also evidence tending to show that defendant knew of plaintiff's nervous condition, rendering him incapable of running as conductor, eight months before he signed the release. The amount paid for plaintiff's release was about 94 per cent of the amount of his original demand for damages: *Held*, insufficient to go to the jury on the issue, and defendant's motion for judgment of nonsuit should have been granted. *West v. R. R.*, 24.

2. *Navigable Streams—Obstruction—Damages—Punitive Damages—Evidence.*—In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by Revisal, 3559, there was evidence sufficient tending to show, and under correct instructions from the court the jury found, that the stream in question was navigable: *Held*, to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation. *Warren v. Lumber Co.*, 34.

3. *Cities and Towns—Streets—Adjoining Owner—Access—Injunction—Damages—Procedure.*—The right of ingress and egress over one's own land to and from a public street is an incident to ownership and constitutes a property right; and an injunction will lie against a town to prevent its depriving an abutting owner to a street of access to his land, and may be joined in the same action with demand for damages. *Crawford v. Marion*, 73.

4. *Telegraphs—Negligence—Physician—Mental Anguish—Notice—Damages.*—A telegram sent to a physician reading, "Come at once. My wife very sick," is sufficient to notify a telegraph company that mental anguish will result to the husband from a negligent delay in its delivery; and the husband may recover damages for the delay, caused by the defendant's negligence, in not sooner having the doctor in attendance upon his sick wife. *Carswell v. Telegraph Co.*, 112.

DAMAGES—*Continued.*

5. *Cities and Towns — Streets—Roads—Obstructions—Changes—Abutting Owner—Damages.*—When a change is made in its streets, or the street is discontinued by the authorities of an incorporated town by legislative sanction, a landowner, as a rule, is restricted to a claim for the damages arising therefrom to him. *Moore v. Meroney,* 158.

6. *Contracts—Mail Carrier—Right to Reject Bids—Damages Consequential.*—Under the Federal statute regulating the bidding by private parties for a contract to carry the United States mail, the department of the Government reserves the right to reject any and all bids if, in its judgment, the good of the service requires it. Hence, damages are too contingent to be recoverable by one in an action against a notary before whom his bond was justified, as required by the statute, which is based upon the allegation that the notary used the information he thus acquired to underbid the plaintiff and obtain the contract. The plaintiff may or may not have received the contract. *Hardison v. Reel*, 273.

7. *Master and Servant — Appliances—Defect—Negligence—Damages.*—When there is no equality of knowledge between the employer and employee with respect to simple tools the former furnishes the latter with which to do his work, the employee has the right to assume that the employer has performed his duty in respect to furnishing him the proper one; and this duty the employer may not delegate to another and escape liability for damages caused by its negligence. *Mercer v. R. R.*, 399.

8. *Contracts—Breach—Goods Sold—Damages—Admissions—Burden of Proof—Delivery—"Ready and Willing."*—In an action to recover for a balance of goods sold under a contract, the answer admitted that defendant had received and paid for a part of the goods, alleging that he did so upon plaintiff's promise and assurance that the remainder would be of a certain standard quality: *Held,* to recover the contract price of the balance of goods, refused upon the allegation that they did not come up to the standard fixed by the contract, the plaintiff must show that it was ready and willing to deliver them, which was denied; and plaintiff's motion for judgment upon the admission in the answer, on the ground that the defendant could not refuse to accept the balance of the goods on account of defects in the goods already received, was properly denied. *Cotton Mills v. Hosiery Mills*, 462.

9. *Contracts — Breach — Goods Sold — Damages — Defects—Evidence.*—The defense, in an action for damages on defendant's

DAMAGES—*Continued.*

refusal to accept certain yarns, sold under contract, being that the yarns were defective, it was competent to show by plaintiff's correspondence in this case matters relating to such defects, in corroboration of defendant's witness; and, also, in reply to plaintiff's evidence that yarns of the character refused by defendant were sent to plaintiff's other customers without complaint made. *Ibid.*

10. *Advancements—User—Damages — Declarations — Evidence.*—Declarations of the intestate as to the value of lands conveyed his sons as advancements made after the date of the deeds: *Held*, in this case, incompetent, and not sufficient to charge one of the sons, who had theretofore for some years had the use of the lands, with the value of timber he had then cut therefrom. *Tart v. Tart*, 502.

11. *Railroads—Damages—Fire—Negligence.*—A railroad company is not liable in damages for a fire originating off its right of way caused by a spark from its properly equipped locomotive properly managed by a competent engineer. *Deppe v. R. R.*, 523.

12. *Same—Evidence, Nonexpert—Questions for Jury.*—In an action for damages caused by defendant's passing locomotive emitting a spark which destroyed plaintiff's dry-kiln by fire, recovery was resisted upon the ground that the locomotive was properly equipped and handled, and that the fire originated within the kiln by the overheating of the steam pipes, and that heat ascends, and consequently fire would break out in the top of the kiln first: *Held*, the opinion of witnesses was incompetent as nonexpert evidence, which was to the effect that the pipes could not have caused the fire as stated, it being the very question the jury was to decide, and in which they could draw their own inferences from the evidence. *Ibid.*

13. *Contracts — Sale of Fertilizer — Damages to Crop—Vendee's Duty—Knowledge.*—The plaintiff brings his action to recover damages to his crop arising from a breach by defendant of its contract to furnish him with a certain quality of cottonseed meal to be used as a fertilizer, and acknowledged that he discovered the defects in time to have procured other fertilizer of the kind required, which he could have obtained: *Held*, it was incumbent upon plaintiff to avoid any damages arising from defendant's failure to properly perform his contract, and he could not recover the damages sought in this action. *Carson v. Bunting*, 530.

DAMAGES—*Continued.*

14. *Injunction—Damages—Cause of Action—Judgment.*—Defendant was restrained from selling plaintiff's land upon plaintiff's application, and *ex mero motu*, as a precaution, the judge restrained plaintiffs from cutting and removing timber. Plaintiffs moved for damages caused by the order restraining them, and it was *Held*, that a judgment upon defendant's motion to dismiss was properly granted, as the damages sought were not recoverable. *Kerr v. Hicks*, 608.

DANGEROUS INSTRUMENTALITY. See Electricity, 1, 2, 3; Master and Servant, 18, 19, 36.

DEADLY WEAPON. See Evidence, 16.

DEBT. See Principal and Surety.

1. *Debtor and Creditor—Payment—Application.*—When the debtor owes two debts, one secured and one not secured, his right to direct the application of a payment made to the creditor must be exercised at the time the payment is made. *Lee v. Manly*, 244.

2. *Same—Change—Consent of Debtor.*—If a debtor fails at the time of payment to direct its application when he owes the creditor a secured and an unsecured debt, the creditor may apply it to either debt, or a part thereof to one and the remainder to the other; and when the application of the payment is once made by the creditor, the assent of the debtor is necessary for him to then change it. *Ibid.*

3. *Debtor and Creditor—Payment—Application by Law.*—When the debtor owes the creditor two debts, one secured and one not secured, and makes the creditor a payment without directing it to either debt, and the creditor himself does not make the application, the law will apply the payment to the unsecured debt. *Ibid.*

4. *Debtor and Creditor—Mortgage—Proceeds—Payment—Application—Question for Jury.*—When the debtor owes a debt secured by a chattel mortgage, and another debt not secured, and makes payment to his creditor, with a part of the proceeds of the property secured by the mortgage, of which the creditor was aware, the execution of the mortgage was an application of the payment upon the debt it secured, which the creditor cannot change without the debtor's consent, and upon conflicting evidence presents a case for the jury upon the issue. *Ibid.*

5. *Debtor and Creditor—Mortgage—Tender—Payment—Application.*—To make a good tender of payment of an amount se-

DEBT—*Continued.*

cured by a mortgage, it is necessary for the debtor to allege and show, in addition to the offer, that he has at all times since the tender been ready, able, and willing to pay, and accompany the plea by payment of the money into court. *Dickerson v. Simmons*, 141 N. C., 330, where the tender was made upon the maturity of the debt; and *Smith v. B. and L. Assn.*, 119 N. C., 261, in relation to tender by a surety, cited and distinguished. *Ibid.*

DEBTOR AND CREDITOR. See Debt; Principal and Surety; Corporations, 1; Mortgage, 10, 11, 12, 13.

DECISIONS.

Precedence—Authority.—It is, at least, a persuasive argument against the maintenance of an action for an alleged wrong that, in the manifold complexity of human affairs, no appeal for the redress of a like grievance has found its way into the courts. *Hardison v. Reel*, 273.

DECLARATIONS. See Evidence, 37, 63, 65, 66. 68.

DEDICATION. See Highways, 5, 6, 7; Cities and Towns, 14.

DEEDS AND CONVEYANCES.

1. *Deeds and Conveyances—Trusts—Principal and Agent—Limitation of Powers.*—For the management and sale of their lands the plaintiffs made a trust deed, which provided for a local and superintending agent, and that no deed made by the trustees would be of any validity or effect unless the same be approved by the superintending agent, who was fully empowered by the writing for that purpose. By various and successive written powers of appointment under the original deed in trust and made in pursuance thereof and referring thereto, several local agents were appointed in succession to each other, expressly stating the condition of approval by the superintending agent to the validity of a sale: *Held*, the requirement of the indorsement of the superintending agent to give validity to the exercise of the power of sale by the trustees is a valid limitation upon their power, and necessary to the validity of their deed. *Thompson v. Power Co.*, 13.

2. *Same—Equity—Contracts to Convey—Specific Performance.*—When in a deed to lands made to a trustee there is a valid condition expressed that a sale would not be valid when made by a local agent unless approved in writing by a superintending agent, definitely limiting the powers of the local agent and trustee, and this condition has not been com-

DEEDS AND CONVEYANCES—*Continued.*

plied with in a contract to convey given to defendant, in the plaintiff's suit to remove a cloud on his title to the *locus in quo: Held,* in this case, a deed subsequently tendered to and refused by the defendant, with the required approval of the superintending agent, who was ignorant of the refusal until just before the commencement of the suit, did not vest the equitable title in the defendant and give him the right to specific performance of the contract to convey. *Ibid.*

3. *Principal and Agent—Deeds and Conveyances—Limited Power—Conflict of Authority.*—In this case the limited power of attorney given the local agent does not conflict with a condition that a designated superintending agent should approve the conveyance to be made by the trustees designated in a deed of trust incorporating a general scheme by the grantors for the sale and management of their lands. *Ibid.*

4. *Deeds and Conveyances—Principal and Agent—Limited Powers—Registration—Notice—Parol Evidence.*—Purchasers are put upon notice of the limited powers of sales agents for lands, which were contained and defined in a registered deed of trust incorporating a general scheme for the sale of grantor's lands for them, and the law requiring that the acts of such agent must be in writing, the scope of the agent's authority cannot be extended by a subsequent oral agreement. *Ibid.*

5. *Same—Ratification—Contracts to Convey—Specific Performance—Equity.*—The grantors in a deed of trust of lands to be conveyed by the trustee for their benefit under a general and defined scheme of sale, imposing a condition that the sale should be assented to in a particular way by an agency defined in the deed for the purpose, are not held to the ratification of the unauthorized acts of sale made without the performance of the condition imposed, by the receipt of the purchase price by the trustees, in the absence of knowledge or notice thereof; and equity will remove the cloud from the title of the *cestuis que trust* upon their paying back the purchase money with interest from the date of payment. *Ibid.*

6. *Deeds and Conveyances—Warranty—Locus in Quo—Location—Issues.*—In an action for damages for breach of warranty in a deed for lands, when it is alleged in the complaint that judgment had been recovered by a third person for a part of the lands upon a title paramount, which is not denied, but the answer alleges that the lands were not embraced in the deed containing the warranty sued on, the issue raised

DEEDS AND CONVEYANCES—*Continued.*

is as to the true location of the land, and does not embrace the paramountcy of the title. *Jones v. Balsley*, 61.

7. *Same—Judgment—Estoppel of Record.*—In an action for damages for breach of warranty in a deed for lands, there was evidence tending to show that in a suit regularly instituted and tried, one W. and others had recovered from plaintiffs a part of the land covered by defendants' warranty. In the former suit nothing appeared to indicate that the location of the land was involved, and in the present suit the issue was whether the *locus in quo* was embraced by the deed and warranty: *Held*, the plaintiff was not estopped by the record in the original suit to show the true location of the land and that the title was protected by the warranty, and, further, to allege and prove damages in his action upon the covenant, it having been only necessary for the plaintiff in the former suit to show paramountcy of title. *Ibid.*

8. *Instructions, Form of—Specific Issues.*—When an action is tried upon specific issues framed to ascertain the facts involved, a prayer for a special instruction that "if the jury believe the evidence, the plaintiff is entitled to recover," may be disregarded. *Ibid.*

9. *Deeds and Conveyances — Damages — Notice to Covenantor—Reasonable Attorneys' Fees.*—The grantee in a deed, with warranty, to lands, being sued for title and possession of a part thereof, informed the warrantor of the pendency of the action, stating that he intended to defend the suit: *Held*, notice sufficient in law to charge the covenantor with all costs incurred by the covenantee in defending the action in good faith, including reasonable attorneys' fees, as such were impliedly within the contemplation of the parties, though no express request was made of the covenantor to defend the action, the notice given, under the circumstances, being a sufficient "tender of the defense." *Ibid.*

10. *Deeds and Conveyances — Invalid Registration — Title.*—The registration of a deed not duly proved is ineffectual to pass title to lands against creditors and purchasers. *Withrell v. Murphy*, 82.

11. *Deeds and Conveyances—Seal.*—Where a corporate act must be executed by an instrument under seal and the corporation had adopted a common seal, the corporation speaks through and by its seal. *Ibid.*

12. *Same—Corporate Act—Evidence—Interpretation of Statutes.*—When it does not appear from the probate of a corporation's

DEEDS AND CONVEYANCES—*Continued.*

deed to lands that the seal affixed is the common seal of the corporation or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with Revisal, sec. 1005, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. *Ibid.*

13. *Same—Official Acts.*—A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. *Ibid.*

14. *Deeds in Trust — Sale — Partnership—Principal and Agent—Dower—Fraud—Evidence—Nonsuit.*—A partnership of three duly executed, with their wives, a deed of trust to F. upon their separate lands to secure a partnership debt, which was foreclosed to pay the debt under its terms and conditions. The lands were bid in by the mortgage creditors, and by them conveyed to one of the firm for the amount of the debt, taking a deed in trust to secure the purchase price. This action is brought by the wife of one of the partners to set aside the conveyances on the ground that the other partners were her agents and acted in fraud of her rights: *Held,* (1) the plaintiff, having duly executed the mortgage to the partnership, conveyed her inchoate right of dower and the purchaser obtained a good and indefeasible title, whether she had paid a part or all of the purchase money for the land embraced in the mortgage, there being no evidence that the sale was not fairly and honestly conducted, or that the terms of the trust deed were not complied with; (2) it appearing that the plaintiff had full knowledge of the advertisement of the land for sale, with full opportunity to pay the debt or redeem beforehand and before the deed was made to the purchaser, and there being no evidence of fraud, a motion to nonsuit should have been allowed. *Wilson v. Wills,* 105.

15. *Deeds and Conveyances—Trusts and Trustees—Parol Trust—Evidence Sufficient.*—In an action to recover lands, defendant admitted the title to be in plaintiff by virtue of his being a grantee of defendant's sons, to whom the defendant had conveyed it by deed for a good and not for a valuable consideration. To establish the defense of a parol trust thereon in defendant's favor, there was evidence tending to show an absence of consideration moving from the sons to the plaintiff; that antecedent to the plaintiff's deed there was an

DEEDS AND CONVEYANCES—*Continued.*

agreement made between the sons and the plaintiff that the latter would hold the *locus in quo* for the use and benefit of defendant during his life, and there was evidence in corroboration that plaintiff had, since his deed, leased a portion of the land from defendant and had several times thereafter attempted to lease the land from him; that the lands comprised the homestead of the defendant, and he had continuously been in possession thereof, enjoying the rents and profits: *Held,* the evidence tended to show an agreement entered into prior to the execution of the deed and as a part of it, creating the parol trust, and was sufficient to sustain a verdict for defendant. *Taylor v. Wahab,* 219.

16. *Trusts and Trustees—Parol Trusts—Evidence—Instructions—Questions for Jury.*—Where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for them to say whether it is "clear, strong, cogent, and convincing." *Ibid.*

17. *Deeds and Conveyances—Reservations—Timber Deeds—Interpretation.*—The plaintiffs conveyed by deed certain described standing timber on their lands not less than 11 inches on the stump when cut, with the right to enter and to cut and to remove said timber within four years from the date of the deed; and thereafter, but before the expiration of the four years given for the cutting and removal of the timber, they conveyed to the defendant the lands described in the deed for the timber, with a provision, after describing the lands, "that the certain timber had been previously sold, etc., and is excepted from this deed." This action involves the title to the timber embraced in the timber deed and not cut and removed within the period of time therein specified, as between the grantor and grantee in the deed for the lands: *Held,* the intent of the grantor is to be gathered from the two deeds, and the legal effect of the deed to the defendant is to convey the land and all the timber thereon not cut and removed by the grantee in the timber deed, in accordance with its provisions, within the four years therein named. *Hornthal v. Howcott,* 228.

18. *Trespass—Calls—Description—Punctuation—Established Lines—Interpretation of Deeds.*—In an action of trespass on lands, the question of defendant's unlawful entry depended, under the construction of the calls in a grant under which he claims title, upon the question whether the second call was controlled by a call to the "Morris line" according to the following description: "Beginning at a pine on W. Creek or

DEEDS AND CONVEYANCES—*Continued.*

Gum Swamp at L.'s corner (this point being admitted), running thence south 41½ degrees west 12⅗ chains; thence south 20½ degrees west 18¼ chains, along Morris's line south 16½ chains," etc. The plaintiff contends that the second call should be run with the Morris line, making a difference of 92 degrees in the two courses: *Held*, (1) the first call not mentioning the "Morris line," makes it probable, at least, that it was not to reach that line; (2) it was not intended that the second call should be "along the Morris line," as the words quoted are separated by a comma from those of the second call, and qualify the third call for course and distance, there also being evidence that the description fits a location of the "Morris line" under the third call; therefore, (3) the rule that, under certain conditions, a call for an established line of an adjoining tract of land will control a conflicting call for course and distance has no application. *Waters v. Lumber Co.*, 232.

19. *Timber Deeds—Time to Cut and Remove—Determinable Estate.* Deeds for standing timber, with their usual provisions, convey to the grantee an estate in fee in the timber, determinable as to all the timber not cut and removed within the stipulated period. *Bateman v. Lumber Co.*, 248.

20. *Same—Extension.*—The provision as to an extension of time in a timber deed, when properly taken advantage of and made available, permits the grantee to cut and remove, for the period of time covered by the extension, the timber therein conveyed. *Ibid.*

21. *Same—Option—Unilateral Contract — Strict Construction.*—A provision in a timber deed granting an extension of time for cutting and removing the timber from the lands described, upon condition of a certain payment to be made by the grantee, is unilateral in its obligations, partaking, to some extent, of the nature of an option, in which time is ordinarily of the essence, and should be strictly construed. *Ibid.*

22. *Same—Notice—Tender.*—A deed to standing timber stated that the grantees "shall have a term of two years in which to cut and remove said timber, and in the event they do not get it off in that time they shall have one year thereafter in which to remove the same by paying to the party of the first part interest on the purchase money for said extension of time." Subsequently, the plaintiff purchased the land whereon the timber was situated, and had his deed duly registered six months before the expiration of the two-year period set out in the timber deed. There being no evidence that the de-

DEEDS AND CONVEYANCES—*Continued.*

fendant notified the owner of the land that he would avail himself of the provision for the further extension of one year, or that he tendered the payment of the interest required for the exercise of that privilege: *Held*, he had lost the right to avail himself thereof, and his cutting and removing the timber specified in the deed after the two years had elapsed was unlawful. *Ibid.*

23. *Deeds and Conveyances—Husband and Wife—Entireties—Survivorship.*—When land is conveyed to husband and wife jointly they take by entireties, and upon the death of one the whole belongs to the survivor. *Morton v. Lumber Co.*, 278.

24. *Same — Tenants in Common — Partition — Evidence.*—When lands are purchased by the husband, and under his instruction are conveyed to him and his wife, jointly, by deed of bargain and sale, with full covenants of warranty, the doctrine of survivorship is not affected by the fact that the lands so purchased were a part of lands conveyed by his father, W., to a guardian for the benefit of the children of W., there being no evidence upon the face of the deed to the husband that it was made in pursuance of a scheme to divide lands held in common among the children of W. *Harrington v. Rawls*, 131 N. C., 40; 136 N. C., 65, and *Sprinkle v. Spainhour*, 149 N. C., 224, cited and distinguished. *Ibid.*

25. *Deeds and Conveyances — Husband and Wife — Purchaser — Parol Trust.*—When a husband pays the purchase money for lands and has the conveyance thereof made to his wife, the law presumes that the lands are intended for a gift, or a provision made for her by him, and such facts alone are insufficient to impress the lands with a trust in his favor. *Ricks v. Wilson*, 282.

26. *Deeds and Conveyances—Grantor—Parol Trust.*—A conveyance of lands made by a father to his son without a consideration cannot impress the lands with a parol trust in favor of the father, however full and explicit the words may have been to that effect used at the time of the delivery of the deed; for a grantor, in delivering a deed, cannot retain control of the property, and by parol create a trust thereafter to be enforced in his own favor. *Ibid.*

27. *Deeds and Conveyances — Married Women — Parol Trusts — Privy Examination—Constitutional Law.*—A conveyance by a married woman of her lands cannot be impressed with a parol trust contrary to the intent expressed in her written

DEEDS AND CONVEYANCES—*Continued.*

deed. The law requires a written instrument, with the husband's written consent, and her privy examination, for her to pass an interest of this character in her lands. *Ibid.*

28. *Deeds and Conveyances—Parol Trust—Infants—Ratification—Execution of Trust.*—Having failed to show a parol trust in her favor under a deed to lands purchased by her father, but conveyed to her mother, plaintiff seeks to establish a lost deed made by her father, mother, and brother, defendants in this action, creating the trust interest for her in the lands, the title to the lands having previously to the execution of the alleged lost deed been conveyed by the father and mother to the brother, the latter of whom, at the time of the execution of the alleged lost deed, was a minor: *Held,* (1) the title in the lands being in the brother at the time in question, it was necessary for him, upon coming of age, to have ratified his deed made in his minority, and his answer denying its execution by him was an act of repudiation; (2) the doctrine that a minor may execute a valid deed in pursuance of a trust has no application. *Ibid.*

29. *Deeds and Conveyances—Creditors—Trustee—Homestead Reserved—Purchaser—Estate Acquired.*—A valid deed in trust made by a debtor in favor of his creditors, reserving to himself his homestead in lands conveyed therein, passes to the grantee all his right, title, and interest in the lands conveyed, excepting his homestead interest expressly reserved; and when such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee. *Davenport v. Fleming,* 291.

30. *Deeds and Conveyances — Trustees—Registration—Creditors—Subsequent Judgment — Homestead—Trespass—Injunction—Interpretation of Statutes.*—A debtor made a deed in trust for the benefit of his creditors, expressly reserving the homestead. The trustee in the deed after allotment sold the land to the wife of the debtor, in a transaction without suggestion of fraud or irregularity: *Held,* a judgment creditor whose judgment was obtained subsequent to the execution and registration of the trust deed acquired no interest in or lien upon the homestead, and could not enjoin the cutting of the timber, within the allotted homestead, by the husband, acting therein under the direction of his wife. Revisal, sec. 686, is, expressly, to have no retroactive effect, and is inapplicable to this case; but if otherwise, by construction, the result is the same. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

31. *Deeds and Conveyances — Contracts—Interpretation—Intent—Entire Instrument.*—In the interpretation of a deed or contract, the intent of the parties, as embodied in the entire instrument, must prevail, and each and every part must be given effect, if it can be done by any fair and reasonable intendment. *Brown v. R. R.*, 300.

32. *Same — Railroads — Material Delivered — Accessibility—Additional Work—Damages.*—In an action to recover a balance alleged to be due the plaintiff under his contract with defendant to build a railroad trestle, and for damages for failure to supply material stipulated for in the manner provided for in the contract, it appeared from the contract sued on that the defendant agreed "to deliver all material for the trestle on cars or on the ground within 300 feet of the trestle, and to be furnished in such manner and time as not to impede the plaintiff (contractor) in the performance of his part of the contract": *Held*, (1) the contract contemplated that defendant should deliver the material within 300 feet of the work, at a point from which a haul could be made to the best advantage, having reasonable regard to the nature of the ground and the attendant facts and circumstances; (2) that under a contract of this character and extent, requiring completion within a specified time, delivery of the material within the specified distance from the work, but across a slough, requiring an additional haul of half a mile, was not such delivery by defendant as called for in the contract, and for such additional work the plaintiff was entitled to recover extra compensation. *Ibid.*

33. *Timber Deeds—Wrongful Cutting — Under Size — Prospective Value—Damage to Land.*—In an action against the grantee in a timber deed for damages alleged as arising from cutting timber less than the size specified in the deed, the plaintiff cannot recover the prospective value of the trees, but the jury may consider their value in determining the injury to the land, the measure of damages being the decrease in the value of the land by reason of the cutting, or the difference in the value before and after the cutting. *Williams v. Lumber Co.*, 306.

34. *Same—Questions — Evidence — Record.*—While the court does not commend the questions asked in this case to ascertain the damages to the land by reason of the grantee in a timber deed cutting timber less than the size allowed by the deed, they are considered in connection with the other parts of the record, especially the judge's charge, and no reversible error is found. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

35. *Timber Deeds—Wrongful Cutting—Under Size—Damages to Land—Measure.*—In an action against the grantees in a timber deed for damages to the land by cutting timber of less dimension than specified, and too small to have a market value as merchantable timber: *Held,* competent for the jury to consider the species of the trees, whether of rapid or slow growth, or whether it would be merchantable when it attained its size, the nature and drainage of the soil, the facilities for marketing, and any other relevant facts to enable them to determine its value at the time of the cutting, and the effect of the cutting on the value of the land. *Whitfield v. Mfg. Co.,* 152 N. C., 214, and like cases cited and distinguished, where the trees were "timber trees." *Ibid.*

36. *Same—Defense—Probable Growth.*—A timber deed conveyed for value "all the pine timber that is now or may be standing, etc., during the term of this lease (five years), 15 inches in diameter at a point 2 feet above the ground"; and provided that the timber should not be cut over more than one time. In an action for damages begun after the lapse of five years, for damages to the land for cutting timber less than the specified size: *Held,* the defense was not available that the trees cut would have attained the specified size during the term of five years. *Ibid.*

37. *Deeds and Conveyances — Mortgages — Assignments — Seal—Title—Trusts and Trustees.*—The grantee in a mortgage deed assigned the deed under a writing thereon as follows: "For value received the F. and M. Bank hereby bargains and sells to M., his heirs and assigns, this mortgage and all its rights, title, and interest to the property therein, together with all rights and powers contained in said mortgage, without recourse to said bank." The assignment was signed by the proper officers of the bank, and it is *Held,* (1) lacking the seal, the assignment could not operate as a conveyance by the corporation; (2) if with the corporate seal, the assignment was solely of the mortgage deed, the written instrument of conveyance, and the security it affords to the holding of the debt, and it did not convey to the assignee the legal title subject to the trusts and powers contained in the mortgage. *Morton v. Lumber Co.,* 336.

38. *Same—Foreclosure — Procedure — Rights of Assignee.*—Under an assignment by the mortgagee of the deed, insufficient to pass the legal title, the assignee acquires only the mortgage debt and the right by proper legal proceedings to subject the lands to its payment. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

39. *Deeds and Conveyances — Mortgages — Assignments — Title— Principal and Agent—Payment — Ratification—Issues—How Considered — Invalid Sale—Equities—Charge Upon Land.*—The owner of three tracts of land, by his agent M., gave to B. a sixty-day option on the timber growing thereon, at the price of $1,400. On one of these tracts of land a mortgage had been executed by the owner to a bank to secure an indebtedness of $160, which was assigned to M. by the bank by a writing on the instrument insufficient to pass the title. M. borrowed $150 of B., and gave him the assigned mortgage as security, and without the knowledge of the mortgagor M. foreclosed, and B., the holder of the option, became the purchaser. It was found by the jury in response to two of the issues submitted that B. had paid $670 and that the mortgagor had received from M. "all the proceeds of the mortgage sale under the agreement": *Held,* (1) the two issues must be considered with reference to the pleadings and evidence; (2) that the word "agreement" referred to the timber option, the only agreement known to the owner; (3) in selling under the mortgage on the land, M. acted as the agent of B., the owner of the mortgage debt; (4) the land mortgaged being in a tract larger than the other two and containing timber estimated at more than one-half of the timber embraced by the option, the $670 paid by M. was the amount due for the timber on that land, which the owner ratified by accepting, and to that timber B. got a clear title; (5) in equity the mortgaged lands should only be chargeable with the $160 secured by the mortgage to the bank, in favor of B., who had paid it. *Ibid.*

40. *Deeds and Conveyances—Boundaries—Questions for Court— Questions for Jury.*—It is a question of law for the court to determine from the face of a deed what are the boundaries therein called for, to be located by the jury when the facts are disputed. *Sherrod v. Battle,* 345.

41. *Deeds and Conveyances — Interpretation — Intent — Natural Boundaries—Course and Distance.*—There being less likelihood that the parties to a deed have erred as to the location of natural objects therein called for, the court will effectuate their intention by allowing natural objects, such as rivers, well-defined streams, islands, trees, or a ditch, which are called for, to control course and distance. *Ibid.*

42. *Deeds and Conveyances — Calls — Boundaries — Questions for Jury—Instructions.*—Where there is ambiguity in the calls of a deed the jury should be instructed by the judge upon the

DEEDS AND CONVEYANCES—*Continued.*

established rules of law applicable, so that they may be aided in their finding upon the evidence as to the true location of the calls; and it is none the less the duty of the judge to so instruct the jury as to what is a boundary, and where it is, when the facts are undisputed and the parties concede that its location is to be fixed by a legal construction of the deed. *Ibid.*

43. *Deeds and Conveyances — Boundaries—Ditches—Definition.*—The words "ditch" or "drain" have no technical or exact meaning; either may indicate a hollow or open space in the ground, natural or artificial, where water is collected or passes off; and such, if sufficiently defined, may bound land as other natural objects. *Ibid.*

44. *Deeds and Conveyances—Boundaries—Ditches—Evidence, Conflicting—Lines—General Direction—Course.*—A disputed divisional line between adjoining lands of the parties was made to depend upon a description in a conveyance, as follows: "Beginning at the head of a ditch on the E. and T. road, running with said ditch in an eastern direction to a branch, thence with said branch to the edge of G. Swamp, thence due east to the canal," etc. The beginning point and the line from there to the second call in the deed were not disputed, but there was evidence tending to show a continuation of the ditch in two directions; that one was a lead ditch continuous from the beginning corner, with the other emptying into it, the latter extending in an eastern direction, and that, by following either, the calls in the deed might be met: *Held,* (1) it was for the jury to say which of these ditches was called for in the deed, and the one so found would control course and distance; (2) the call for the line, "running with the ditch in an eastern direction," was not controlling so as to exclude a line running with one of the ditches in a general eastward direction, because it varied its course, sometimes east, northeast, and even north, in favor of the other running more nearly in an eastern direction. *Ibid.*

45. *Deeds and Conveyances — Intent of Grantor — Declarations—Parol Evidence—Reformation—Mutual Mistake.*—The grantor's declaration as to his intent cannot affect the location of lines expressed in his deed where the reformation of the deed on the ground of mutual mistake is not sought in the action. *Ibid.*

46. *Deeds and Conveyances — Description — Number of Acres — Aider.*—For instances in which the number of acres mentioned in the deed to lands may aid the description therein, *Whitaker v. Cover*, 140 N. C., 280, cited and approved. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

47. *Timber Deeds—Contracts—Trees Under Size—Trespass.*—An action against the grantee in a timber deed, or his assignees, for the cutting of trees of less dimension than those specified in the deed is virtually one for trespass on the land in wrongfully cutting and removing timber therefrom. *Jenkins v. Lumber Co.*, 355.

48. *Timber Deeds — Contracts — Time for Cutting — Expiration— Ownership.*—Trees not cut by the grantee or his assignees under a timber deed within the period of time therein fixed for the purpose become the property of the owner of the land. *Ibid.*

49. *Same—Offset.*—The grantee in a timber deed may not offset damages to the land sustained by the owner, caused by his wrongfully cutting trees under the size specified in his contract, by the value of the trees of the specified size he has left on the land after the expiration of the period of time allowed for his cutting them, as such have then become the sole property of the owner. *Ibid.*

50. *Timber Deeds — Contracts — Trees Under Size — Measure of Damages.*—The measure of damages in an action against the grantee in a timber deed for the wrongful cutting of trees under the size specified in the contract is the difference between the value of the land before and after the wrong was committed, or the amount by which the land was diminished by the trespass. *Ibid.*

51. *Wills—Devises—Limitations—Conditions—Surviving Children —Deeds and Conveyances—Title—Defeasance.*—Under a devise of a life estate in lands, with limitation over to L., and to "the child or children of her body," with proviso if L. "dies without leaving any children, then, and in no other case, to my lawful heirs," the fee simple vests in L., defeasible upon her dying without leaving a child, and L. cannot execute a good deed in fee simple. *Elkins v. Seigle*, 374.

52. *Deeds and Conveyances—Purchaser—Doubtful Title.*—A purchaser of lands is not required to accept a doubtful title. *Ibid.*

53. *Timber Deeds—Right to Remove—Consideration—Payment— Title to Remaining Timber—Interpretation of Deeds.*—A timber deed provided that all timber shall be removed by the grantee within a period of five years from the date of the last payment of the purchase money, and that an extension for that purpose would be allowed upon payment of interest on the purchase price "each year in advance": *Held*, a

DEEDS AND CONVEYANCES—*Continued.*

tender of the interest not made within the time specified in the deed is insufficient, and by his failure to make the required tender the grantee lost his right to the extension of time within which to remove the timber, and his interest in the timber remaining upon the land. *Powers v. Lumber Co.*, 405.

54. *Deeds and Conveyances—Title—Common Source—Rule of Convenience.*—As a rule of convenience and not as a matter of estoppel, parties to an action involving title to land claiming it from the same person are not allowed to deny the title in the common source. *Bowen v. Perkins*, 449.

55. *Same—Superior Title—Evidence.*—When the title to the land in controversy is claimed by both parties from a common source, the older title will prevail unless there is shown a better title from the one under whom both claim, or from some other person. *Ibid.*

56. *Deeds and Conveyances—Common Source—Inconsistent Title—Evidence.*—One who enters into possession of lands under a contract to purchase creates a relationship with the owner analogous to that of tenant and landlord; and until ousted or disturbed in his possession by one having a paramount title, he will not be permitted in an action for possession by the party under whom he entered to set up a title inconsistent with his. *Ibid.*

57. *Deeds and Conveyances—Title—Common Source—Contract of Purchase—Rule of Convenience.*—When the plaintiff and defendant in an action to recover lands deduce their title from a common origin, the one by deed and mesne conveyances and the other under an executory contract of purchase, neither is allowed to deny the title in the common source, for between them the elder is the better title and must prevail unless the adverse party can show a better outstanding title which he has acquired. *Ibid.*

58. *Same — Parol Agreement — Statute of Frauds.*—The plaintiff claimed title to the lands in controversy by deed and mesne conveyances, and defendant claimed under an alleged parol contract of purchase made by his lessor with one under whom plaintiff claimed in his chain of title: *Held*, the statute of frauds was not involved, and evidence of the parol contract was admissible to show that defendant claimed title from the same source as plaintiff. *Ibid.*

59. *Deeds and Conveyances—Interpretation of Deeds—Security—Debt—Equitable Mortgages.*—When the real object of a con-

DEEDS AND CONVEYANCES—*Continued.*

veyance of land is to provide a security for a loan or debt, equity will regard the conveyance as a mortgage, and will look beyond the mere form of the conveyance and the words therein employed, to ascertain the true intent of the parties respecting the transaction. *Sandlin v. Kearney*, 596.

60. *Same—Debtor and Creditor—Implied Promise of Repayment.*—When one, at the request of another, purchases and pays for land for the latter, the law implies a promise on the part of the one for whom the purchase was made that he will repay the purchase price, with interest, thus establishing the relationship of creditor and debtor; and when the one thus acting for the other takes the deed to himself, equity will regard the deed as being in the nature of a mortgage to secure the money advanced by him. *Ibid.*

61. *Same—Legal Title—Principal and Agent.*—S., at the request of K., purchased certain lands for him, paid the purchase price and had the deed made to himself, and from the admissions in the pleadings it appears that it was done under a parol agreement that he was to convey to K. upon the repayment by the latter of the purchase price and interest. The statute of frauds was not pleaded: *Held,* (1) under the admissions in the pleadings, equity will regard the deed to S. in the nature of a mortgage to secure the repayment of the purchase price of the land; (2) the purchase of the land by K. through S. was in effect as if K. had made the purchase himself; (3) it was not necessary to the equity of K. that he should have held the legal title; (4) the effect of the transaction was governed by the agreement between S. and K. without regard to what the vendor may have understood. *Ibid.*

62. *Deeds and Conveyances — Debtor and Creditor — Equitable Mortgage—Limitations of Actions.*—As the deed for the land to S. was in effect a mortgage to secure the repayment of the purchase price of land he had bought for K., and it appearing that K. had entered into possession of the land since the last payment on the debt, and retained the same for a sufficient length of time, under the statute of limitations, to bar the right of S.: *Held,* that S. is not entitled to recover in this action, which was brought to have the land sold in order to pay the amount advanced by him. *Ibid.*

DEFEASANCE. See Wills, 6.

DEFECTIVE MACHINERY. See Master and Servant.

DEFECTIVE STATEMENT. See Pleadings, 4.

DEFECTS. See Master and Servant.

DELIVERY. See Telegraphs, 2; Measure of Damages, 2; Insurance, 7; Sales, 3.

DEMURRER. See Pleadings, 6, 8, 9, 10.

DESCENT AND DISTRIBUTION.

1. *Estates—Illegitimates—Inheritance—Interpretation of Statutes.*—Revisal, sec. 1556, Rules 9 and 10, does not restrict the principle that "all illegitimates" have the same right of inheritance as between themselves "as if legitimate," but broadly reiterates the doctrine in the most unambiguous terms. *Ashe v. Mfg. Co.*, 241.

2. *Same—"Half Blood"—Mother.*—There is no half blood between illegitimates, and they take by descent only through their mother. The statute regulates the descent of the realty of illegitimates who die intestate, without reference to the father. Revisal, sec. 1556. *Ibid.*

3. *Estates—Illegitimates—Inheritance—Prohibited Marriages—Races—Constitutional Law—Interpretation of Statutes.*—The constitutional prohibition (Art. XIV, sec. 6) of marriages between the races does not affect an illegitimate brother's inheriting the estate of an intestate whose father was a negro and mother a white woman; and the fact that the intestate could not be treated "as if born in lawful wedlock," Revisal, sec. 1556, Rules 9 and 10, has no application. *Ibid.*

4. *Advancements—Definition.*—An advancement is a free and irrevocable gift by a parent, in his lifetime, to his child, or to a person standing in place of such child, on account of such child or person's share in the donor's estate, which he will receive under the statute of descent or distribution if the parent or donor die intestate. *Tart v. Tart*, 502.

5. *Advancements—Interest—Accounting.*—No interest on an advancement made by a deceased parent to his child shall be charged against the child until an accounting, when same is had within the two years' time allowed by law to settle the estate of the intestate, whether the advancement had been made in lands, investments, or money. *Ibid.*

6. *Same—Rents and Profits—User.*—Where in 1885 a father put one of his sons in possession of a tract of land, and the latter remained in possession, enjoying the rents and profits until 1906, when the father conveyed the land by way of advancement to the son and his seven children, it was *Held*, (1) that the rents and profits of the land until conveyance made were

DESCENT AND DISTRIBUTION—*Continued.*

under ordinary conditions properly chargeable as advancements; (2) that owing to the difficulty of determining the amount of such rents and profits by reason of improvements put upon the land by the son and claimed as permanent, the proper basis of accounting in the present case is held to be the interest on the value of the land from the time the son became possessed of it, and as it then was, until the conveyance in 1906; (3) that the son's interest in the land at the time of the conveyance made in 1906 is also chargeable as an advancement and without interest. *Ibid.*

7. *Same.*—When an advancement of lands has been made by the intestate to his child, no rents or profits are chargeable to the child until an accounting, if had within the time allowed by law for the settlement of estates. *Ibid.*

8. *Executors and Administrators—Personalty—Deceased Widow—Distributive Share—To Whom Payable.*—The intestate died, leaving children by a former marriage and a widow, who subsequently died intestate. An administrator of her estate qualified, and was made a party in an action between the husband's heirs at law for division of his property, in which his administrator was also a party: *Held,* in this case the share of the deceased widow in her husband's personal property should be paid to her administrator. *Ibid.*

9. *Advancements—User—Damages — Declarations — Evidence.*—Declarations of the intestate as to the value of lands conveyed his sons as advancements made after the date of the deeds: *Held,* in this case, incompetent, and not sufficient to charge one of the sons, who had theretofore for some years had the use of the lands, with the value of timber he had then cut therefrom. *Ibid.*

DESCRIPTION. See Deeds and Conveyances, 18, 46.

DEVISES. See Wills, 5, 6.

DISCRETION. See Courts; Removal of Causes, 2.

DISCRIMINATION. See Schools and School Districts, 1, 2, 5; Railroads, 26.

DISOBEDIENCE. See Negligence, 35, 36.

DISQUALIFICATION. See Jurors, 3.

DITCHES. See Deeds and Conveyances, 43, 44.

DIVORCE. See Marriage and Divorce.

DUE PROCESS. See Constitutional Law, 15.

DUTY TO INSPECT. See Master and Servant, 27, 28.

EASEMENT. See Cities and Towns, 13.

EJECTMENT.

Ejectment — Defendant's Bond—Receiver—Power of Court—Supreme Court — Supersedeas Order — Practice.—Revisal, 453, requiring defendant in ejectment to give bond before putting in a defense to the entire action, does not abridge the power of the court to appoint a receiver to secure the rents and profits; and while the Supreme Court, under its general power of "supervision and control over the proceedings of the Superior Court," might exercise the extraordinary right to grant a *supersedeas* to vacate an order appointing a receiver and permit defendant to give bond, it will not do so except under unusual circumstances, as when there has been a gross abuse of discretion by the trial judge. *Arey v. Williams*, 610.

ELECTION. See Contracts, 44, 45; Pleadings, 7.

ELECTRICITY.

1. *Electricity—Furnishing Lights—Public Service—Duty.*—A contract entered into by an electric power company to furnish electricity for a given number of lights or for a given amount of power must be construed and determined according to the general principles of the contract as to the amount of power or light to be supplied, and the obligations assumed by the company under the contract are, as a rule, absolute; but the duties incumbent on the vendor company, by reason of the dangerous nature of electricity and as to the methods and appliances for its proper use and delivery, in the absence of specific stipulations concerning them, are to be considered as arising, in part, from the position the parties have assumed towards each other, and to be determined under the general principles of the law of negligence. *Turner v. Power Co.*, 131.

2. *Same—Public Service — Corporations — Negligence — Stipulations.*—A corporation engaged in furnishing electric power and lights to its patrons in the exercise of chartered rights and privileges conferred by the lawmaking power, in part for the public benefit, are *quasi*-public corporations, and may not stipulate against their own negligence or transfer the obligations incumbent upon them, in the absence of legislative authority to do so. *Ibid.*

ELECTRICITY—*Continued.*

3. *Electricity—Furnishing Lights—Public-service Corporations—Dangerous Instrumentalities—Care Required.*—While the law does not regard a *quasi*-public corporation, furnishing electric power and light to its patrons, as insurers against injury arising to them from its use, it owes to them the duty to protect them by exercising the highest skill, the most consummate care and caution and utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances obtainable, consistent with the practical operation of the plant. *Ibid.*

EMPLOYEES. See Jurors, 1.

ENTIRETIES. See Husband and Wife, 1.

EQUALITY OF KNOWLEDGE. See Master and Servant, 27, 28.

EQUITY. See Estoppel, 6, 9, 10.

1. *Equitable Liens—Form—Equity—Priorities.*—No especial form or phraseology is necessary to create an equitable lien, and a court of equity will look through the form to the substance; and when it appears that the parties intended to charge or pledge property as security to the debt, and the property can be identified, the lien follows, and the court will enforce it against all except those having a superior claim. *Garrison v. Vermont Mills*, 1.

2. *Deeds and Conveyances—Trusts—Principal and Agent—Equity—Contracts to Convey—Specific Performance.*—When in a deed to lands made to a trustee there is a valid condition expressed that a sale would not be valid when made by a local agent unless approved in writing by a superintending agent, definitely limiting the powers of the local agent and trustee, and this condition has not been complied with in a contract to convey given to defendant, in the plaintiff's suit to remove a cloud on his title to the *locus in quo: Held*, in this case, a deed subsequently tendered to and refused by the defendant, with the required approval of the superintending agent, who was ignorant of the refusal until just before the commencement of the suit, did not vest the equitable title in the defendant and give him the right to specific performance of the contract to convey. *Thompson v. Power Co.*, 13.

3. *Deeds and Conveyances—Principal and Agent—Ratification—Contracts to Convey — Specific Performance — Equity.*—The grantors in a deed of trust of lands to be conveyed by the trustee for their benefit under a general and defined scheme

EQUITY—*Continued.*

of sale, imposing a condition that the sale should be assented to in a particular way by an agency defined in the deed for the purpose, are not held to the ratification of the unauthorized acts of sale made without the performance of the condition imposed, by the receipt of the purchase price by the trustees, in the absence of knowledge or notice thereof; and equity will remove the cloud from the title of the *cestuis que trust* upon their paying back the purchase money with interest from the date of payment. *Ibid.*

4. *Cities and Towns — Paving Streets—Prerequisites—Jurisdictional—Order—Appeal — Injunction — Equity.*—When, under a statutory authority given a city to pave its streets, it is among other things required that a petition be filed by the owners of a majority of the front feet abutting thereon and notice be given, etc., prior to an order made by the aldermen, and it appearing that the order had been made upon petition after giving the notice required by the statute, and in other respects in pursuance of the act, and no objection entered or appeal from the order as provided for: *Held*, after the expiration of five years an order restraining sale of plaintiff's property to pay for the paving will not be granted to two of the abutting owners on the street, upon the ground that a majority, as provided, of the abutting owners had not in fact signed the petition; (1) the assessment and levy, as made, had the effect of a judgment and lien; (2) though the petition was a prerequisite, it was not jurisdictional, and the order, in effect, was a finding that the petition was true, and, not appealed from, was conclusive; (3) the statutory notice made the plaintiffs parties to the proceedings; (4) the granting of a restraining order after five years would be inequitable to the other taxpayers and property-owners of the town. *Shank v. Asheville*, 40.

5. *Equity—Contracts—Specific Performance—Pleadings—Prayers for Relief.*—In a suit for specific performance brought by the vendor, the measure of the kind of relief a court of equity will grant is not necessarily determined or controlled by the relief demanded in the complaint, but by the facts set out in the pleadings. *Councill v. Bailey*, 54.

6. *Same—Measure of Relief.*—Plaintiff in an action against the vendee alleged in his complaint that the latter had entered into a written contract with him for the purchase of certain lands, and he had tendered him a good and sufficient deed in accordance with the terms and conditions of his contract to convey, and prayed for a judgment for the purchase money,

EQUITY—*Continued.*

adding a general prayer "for such other and further relief to which he may be entitled": *Held*, sufficient to warrant a judgment for a specific performance of the contract in every respect, including a declaration of a vendor's lien upon the land and a direction for a sale thereof to satisfy the debt. *Ibid.*

7. *Equity — Contracts — Specific Performance — Vendor's Lien— Sales—Removal of Causes.*—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is removable to the county in which the land is situated. Revisal, sec. 419. *Ibid.*

8. *Married Women—Separate Realty—Husband and Wife—Work Done—Liens—Equity.*—Equity will not interfere to give a husband a lien on his wife's land for work done, etc., by reason of the consequent improved value of the wife's land. *Kearney v. Vann*, 311.

9. *Deeds and Conveyances — Mortgages — Assignments — Title— Principal and Agent—Payment — Ratification—Issues—How Considered — Invalid Sale—Equities—Charge Upon Land.*— The owner of three tracts of land, by his agent M., gave to B. a sixty-day option on the timber growing thereon, at the price of $1,400. On one of these tracts of land a mortgage had been executed by the owner to a bank to secure an indebtedness of $160, which was assigned to M. by the bank by a writing on the instrument insufficient to pass the title. M. borrowed $150 of B., and gave him the assigned mortgage as security, and without the knowledge of the mortgagor M. foreclosed, and B., the holder of the option, became the purchaser. It was found by the jury in response to two of the issues submitted that B. had paid $670 and that the mortgagor had received from M. "all the proceeds of the mortgage sale under the agreement": *Held*, (1) the two issues must be considered with reference to the pleadings and evidence; (2) that the word "agreement" referred to the timber option, the only agreement known to the owner; (3) in selling under the mortgage on the land, M. acted as the agent of B., the owner of the mortgage debt; (4) the land mortgaged being in a tract larger than the other two and containing timber estimated at more than one-half of the

EQUITY—*Continued.*

timber embraced by the option, the $670 paid by M. was the amount due for the timber on that land, which the owner ratified by accepting, and to that timber B. got a clear title; (5) in equity the mortgaged lands should only be chargeable with the $160 secured by the mortgage to the bank, in favor of B., who had paid it. *Morton v. Lumber Co.*, 336.

10. *Equity — Remedy at Law — Code Practice.*—Under our Code system of practice, pleadings, and procedure, it is unnecessary for a party seeking equitable relief to first reduce his demand to judgment, or exhaust his legal remedy by execution or other appropriate process. *Silk Co. v. Spinning Co.*, 421.

11. *Insurance, Fire — Cancellation—Substitution—Mortgagor and Mortgagee—"Loss Payable" Clause—Estoppel—Equity.*—The defendants, three fire insurance companies, issued several policies on a mortgaged premises with the usual loss clause, payable to the mortgagee. One of them solicited, through its agent, a policy in substitution of the three policies, and issued a policy accordingly, claiming through its general agent the premiums therefor. In this policy there was no clause with loss payable to the mortgagee, and it appears that he was not aware of the change of policies until after the property was destroyed by fire and the insurance due. The other companies were notified, and canceled their policies, sending them to the mortgagor, requesting a return of the canceled policies, which were not returned because of their being in possession of mortgagee. In an action by the mortgagor and mortgagee against the three companies to recover the insurance due by the loss by fire of the premises: *Held*, (1) the insurance company issuing the substituted policy and the mortgagor are estopped by their conduct to deny the cancellation of the three original policies and the substitution of the later one in lieu thereof; (2) the release of the three original policies was only binding between the parties to the agreement, and not upon the mortgagee; (3) the mortgagee is entitled to judgment for one-third part of his debt against each of the three original policies, to be canceled upon payment of his loss out of the substituted policy. *Lee v. Insurance Co.*, 446.

12. *Deeds and Conveyances—Interpretation of Deeds—Security—Debt—Equitable Mortgages.*—When the real object of a conveyance of land is to provide a security for a loan or debt, equity will regard the conveyance as a mortgage, and will look beyond the mere form of the conveyance and the words

EQUITY—*Continued.*

therein employed, to ascertain the true intent of the parties respecting the transaction. *Sandlin v. Kearney*, 596.

13. *Same—Debtor and Creditor—Implied Promise of Repayment.* When one, at the request of another, purchases and pays for land for the latter, the law implies a promise on the part of the one for whom the purchase was made that he will repay the purchase price, with interest, thus establishing the relationship of creditor and debtor; and when the one thus acting for the other takes the deed to himself, equity will regard the deed as being in the nature of a mortgage to secure the money advanced by him. *Ibid.*

14. *Same—Legal Title—Principal and Agent.*—S., at the request of K., purchased certain lands for him, paid the purchase price and had the deed made to himself, and from the admissions in the pleadings it appears that it was done under a parol agreement that he was to convey to K. upon the repayment by the latter of the purchase price and interest. The statute of frauds was not pleaded: *Held*, (1) under the admissions in the pleadings, equity will regard the deed to S. in the nature of a mortgage to secure the repayment of the purchase price of the land; (2) the purchase of the land by K. through S. was in effect as if K. had made the purchase himself; (3) it was not necessary to the equity of K. that he should have held the legal title; (4) the effect of the transaction was governed by the agreement between S. and K. without regard to what the vendor may have understood. *Ibid.*

15. *Deeds and Conveyances — Debtor and Creditor — Equitable Mortgage—Limitations of Actions.*—As the deed for the land to S. was in effect a mortgage to secure the repayment of the purchase price of land he had bought for K., and it appearing that K. had entered into possession of the land since the last payment on the debt, and retained the same for a sufficient length of time, under the statute of limitations, to bar the right of S.: *Held*, that S. is not entitled to recover in this action, which was brought to have the land sold in order to pay the amount advanced by him. *Ibid.*

ESTATES. See Husband and Wife, 4, 5, 6, 7.

1. *Estates—Illegitimates — Inheritance — Interpretation of Statutes.*—Revisal, sec. 1556, Rules 9 and 10, does not restrict the principle that "all illegitimates" have the same right of inheritance as between themselves "as if legitimate," but broadly reiterates the doctrine in the most unambiguous terms. *Ashe v. Mfg. Co.*, 241.

ESTATES—*Continued.*

2. *Same—"Half Blood"—Mother.*—There is no half blood between illegitimates, and they take by descent only through their mother. The statute regulates the descent of the realty of illegitimates who die intestate, without reference to the father. Revisal, sec. 1556. *Ibid.*

3. *Estates—Illegitimates — Inheritance — Prohibited Marriages—Races—Constitutional Law—Interpretation of Statutes.*—The constitutional prohibition (Art. XIV, sec. 6) of marriages between the races does not affect an illegitimate brother's inheriting the estate of an intestate whose father was a negro and mother a white woman; and the fact that the intestate could not be treated "as if born in lawful wedlock," Revisal, sec. 1556, Rules 9 and 10, has no application. *Ibid.*

4. *Timber Deeds—Time to Cut and Remove—Determinable Estate.*—Deeds for standing timber, with their usual provisions, convey to the grantee an estate in fee in the timber, determinable as to all the timber not cut and removed within the stipulated period. *Bateman v. Lumber Co.*, 248.

5. *Same—Extension.*—The provision as to an extension of time in a timber deed, when properly taken advantage of and made available, permits the grantee to cut and remove, for the period of time covered by the extension, the timber therein conveyed. *Ibid.*

6. *Same—Option—Unilateral Contract — Strict Construction.*—A provision in a timber deed granting an extension of time for cutting and removing the timber from the lands described, upon condition of a certain payment to be made by the grantee, is unilateral in its obligations, partaking, to some extent, of the nature of an option, in which time is ordinarily of the essence, and should be strictly construed. *Ibid.*

7. *Same — Notice — Tender.*—A deed to standing timber stated that the grantees "shall have a term of two years in which to cut and remove said timber, and in the event they do not get it off in that time they shall have one year thereafter in which to remove the same by paying to the party of the first part interest on the purchase money for said extension of time." Subsequently, the plaintiff purchased the land whereon the timber was situated, and had his deed duly registered six months before the expiration of the two-year period set out in the timber deed. There being no evidence that the defendant notified the owner of the land that he would avail himself of the provision for the further extension of one year, or that he tendered the payment of the interest re-

ESTATES—*Continued.*

quired for the exercise of that privilege: *Held,* he had lost the right to avail himself thereof, and his cutting and removing the timber specified in the deed after the two years had elapsed was unlawful. *Ibid.*

8. *Homestead—Interest—Estates.*—A homestead in lands is not an estate therein, but a mere exemption right. *Davenport v. Fleming,* 291.

9. *Deeds and Conveyances—Creditors—Trustee—Homestead Reserved—Purchaser—Estate Acquired.*—A valid deed in trust made by a debtor in favor of his creditors, reserving to himself his homestead in lands conveyed therein, passes to the grantee all his right, title, and interest in the lands conveyed, excepting his homestead interest expressly reserved; and when such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee. *Ibid.*

10. *Wills—Devise—Trusts and Trustees—Intent—Life Estate—Remainder—Intestacy—Presumptions—Rule in Shelly's Case.* A devise of lands in special trust that J., a grandson, be allowed the "use and enjoyment" thereof during his life, and in case he should die before attaining the age of 21 years without having living children, "then to the use and enjoyment of my living children and their heirs": *Held,* (1) a devise of the fee simple will not be presumed, Revisal, 3138; (2) J. would take a life estate, with remainder to his living children, if any, and otherwise the title would then revert to the estate of the testator; (3) the presumption is in favor of testacy, requiring no express devise to the living children of J.; (4) the rule in *Shelly's case* has no application. *Cox v. Jernigan,* 584.

11. *Life Estates—Possession—Remainder—Limitations of Actions.* The possession of a life tenant, however long, can confer no title against the remaindermen. *Ibid.*

ESTIMATE. See Contracts, 6.

ESTOPPEL. See Deeds and Conveyances, 54.

1. *Judgment—Estoppel of Record.*—In an action for damages for breach of warranty in a deed for lands, there was evidence tending to show that in a suit regularly instituted and tried, one W. and others had recovered from plaintiffs a part of the land covered by defendants' warranty. In the former suit nothing appeared to indicate that the location of the land was involved, and in the present suit the issue was

ESTOPPEL—*Continued.*

whether the *locus in quo* was embraced by the deed and warranty: *Held*, the plaintiff was not estopped by the record in the original suit to show the true location of the land and that the title was protected by the warranty, and, further, to allege and prove damages in his action upon the covenant, it having been only necessary for the plaintiff in the former suit to show paramountcy of title. *Jones v. Balsley*, 61.

2. *Estoppel—Parties and Privies—Partition—Judgment—Title—Different Right.*—Estoppel of record will bind parties and privies as to matters in issue between them, but it does not conclude as to matters not involved in the issue, nor when they claim in a different right. *Gillam v. Edmonson*, 127.

3. *Estoppel—Partition—Judgment—Adjoining Owners—Identity—Issues—Mutuality.*—In partition proceedings between the heirs at law of the deceased, the dividing lines between the *locus in quo* and adjoining owners not being involved and the question involved being only what was a fair division of the lands between the parties, the judgment therein does not estop one of the petitioners to show his true line between his portion and an adjoining owner, not a party to the proceedings, as the identity of that line was not therein involved, and there was no mutuality upon which the application of the doctrine of estoppel could be founded. *Ibid.*

4. *Same—Petitioner—Lands Afterwards Acquired—Title—Different Right.*—A judgment in partition proceedings fixing only the divisional boundaries of the *locus in quo* between the heirs at law does not estop the heirs at law from showing the true dividing line between their land and an adjoining tract, nor does it estop one of them, who has afterwards acquired the lands of an adjoining owner to the portion allotted to another of the heirs, from showing the true boundary line of his purchase, as he holds the lands so acquired under the title of his vendor, who was not a party to the partition proceedings, and in such case there could be no mutuality of estoppel upon which its application could be made. (*Carter v. White*, 134 N. C., 469, cited and distinguished.) *Ibid.*

5. *Arbitration and Award—Courts—Jurisdiction—Ouster—Effect—Estoppel.*—When the effect of an agreement to arbitrate controversies which may arise in the course of executing a contract is to oust the jurisdiction of the courts in such matters, it cannot be enforced against one of the parties as

ESTOPPEL—*Continued.*

a condition precedent to his bringing his action; though as to other matters embraced therein which have arisen and have been referred to arbitration, and as to which an award has been rendered, the effect of the award is to conclude the parties. In this case amendment to pleadings is suggested so as to conform the issues to matters left in dispute. *Williams v. Mfg. Co.*, 205.

6. *Lands—Title—Equitable Estoppel—Divisional Lines.*—A party claiming title to lands only by reason of an equitable estoppel of the other party to the action, arising from his alleged acts and conduct respecting a line between adjoining lands, must show that the acts and conduct relied on have misled and caused him loss or damage. *Boddie v. Bond*, 359.

7. *Same.*—A party seeking in his action to estop another by his acts and conduct from claiming certain lands must show that he has been misled and prejudiced in some way by the same; otherwise, the acts and conduct relied on would not appear to cause him loss or damage. *Ibid.*

8. *Same—Deception—Fraud—Principal and Agent—Ratification—Evidence.*—The title to the disputed land was in plaintiff, unless she is estopped by her acts respecting an agreement upon a line as incorporated in a deed made to a third party, Mrs. M., the latter of whom acted through her husband M., in its purchase. The evidence disclosed that M. and defendant agreed that a certain line should divide the *locus in quo* from the land to be conveyed by plaintiff to Mrs. M.; that the plaintiff was unaware of this agreement and took no part in it, and, further, was unaware at the time of the transaction that she owned the land now in dispute; that before she signed the deed to Mrs. M., M. told the plaintiff that he had agreed with defendant on a line between the two lots, and the agreement was referred to in the deed to his wife; that M., in his transactions with the defendant, did not act as the agent of the plaintiff or represent her: *Held*, there was no element of an equitable estoppel against plaintiff's claiming the land; (1) there was no evidence of any loss by defendant arising from the acts complained of; (2) M. and defendant attempted to change a line and not to determine upon and settle a disputed one; (3) there was not the element of intentional deception or fraud or conduct calculated to mislead defendant to his prejudice indicated by the evidence as to plaintiff's acts, or any evidence of ratification by plaintiff of the acts of M. The principle of equitable estoppel discussed by WALKER, J. *Ibid.*

ESTOPPEL—*Continued.*

9. *Insurance, Fire—Cancellation—Substitution—Mortgagor and Mortgagee—"Loss Payable" Clause—Estoppel—Equity.*—The defendants, three fire insurance companies, issued several policies on a mortgaged premises with the usual loss clause, payable to the mortgagee. One of them solicited, through its agent, a policy in substitution of the three policies, and issued a policy accordingly, claiming through its general agent the premiums therefor. In this policy there was no clause with loss payable to the mortgagee, and it appears that he was not aware of the change of policies until after the property was destroyed by fire and the insurance due. The other companies were notified, and canceled their policies, sending them to the mortgagor, requesting a return of the canceled policies, which were not returned because of their being in possession of mortgagee. In an action by the mortgagor and mortgagee against the three companies to recover the insurance due by the loss by fire of the premises: *Held*, (1) the insurance company issuing the substituted policy and the mortgagor are estopped by their conduct to deny the cancellation of the three original policies and the substitution of the later one in lieu thereof; (2) the release of the three original policies was only binding between the parties to the agreement, and not upon the mortgagee; (3) the mortgagee is entitled to judgment for one-third part of his debt against each of the three original policies, to be canceled upon payment of his loss out of the substituted policy. *Lee v. Insurance Co.*, 446.

EVIDENCE. See Burden of Proof; Nonsuit; Pleadings; Questions for Jury; Reference, 5, 7.

1. *Deeds and Conveyances—Principal and Agent—Limited Powers—Registration—Notice—Parol Evidence.*—Purchasers are put upon notice of the limited powers of sales agents for lands, which were contained and defined in a registered deed of trust incorporating a general scheme for the sale of grantor's lands for them, and the law requiring that the acts of such agent must be in writing, the scope of the agent's authority cannot be extended by a subsequent oral agreement. *Thompson v. Power Co.*, 13.

2. *Navigable Streams—Obstruction—Damages—Punitive Damages—Evidence.*—In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by Revisal, 3559, there was evidence sufficient tending to show, and under correct instructions from the court the jury found, that the stream in

EVIDENCE—*Continued.*

question was navigable: *Held*, to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation. *Warren v. Water Co.*, 34.

3. *Master and Servant—Safe Appliances—Evidence Sufficient.*—The servant was employed to load rails on a car, and was injured while turning one of them after it had been placed on the car. There was evidence tending to show that three railroad companies furnished a certain kind of tongs for this purpose, and had one been furnished the plaintiff the injury would not have occurred: *Held*, evidence sufficient to go to the jury as to the master's liability in failing to furnish a proper appliance to the servant. *Bailey v. Meadows Co.*, 71.

4. *Courts—Treaties—Grants—Official Boundaries — Judicial Notice—Evidence.*—The Meigs and Freeman line having been run by the Federal Government in obedience to the treaty power vested in it by the Constitution of the United States, and expressly recognized by the Legislature of this State, the courts will take judicial notice of its existence; but its physical location is the subject-matter of proof. *Land and Timber Co. v. Kinsland*, 79.

5. *Deeds and Conveyances—State Grants — Official Boundaries—Evidence Insufficient.*—The plaintiff deraigns his title to the *locus in quo* from a grant from the State, and the question presented is whether it is situated on the west of the Meigs and Freeman line, where the lands are reserved to the Cherokee Indians under a treaty with the Federal Government, or east thereof. Defendant introduced evidence by a witness that eighty years after the running of the Meigs and Freeman line he was an employee of the Government, and that the true meridian line was used by the Government, which in the case at bar would sustain defendant's contention. On the line contended for by plaintiff was discovered marked trees and natural objects indicating a very old marking, but none on that contended for by defendant: *Held*, there was insufficient evidence to sustain the jury's finding for defendant, and a new trial is ordered. *Ibid.*

6. *Deeds and Conveyances—Seal—Corporate Act—Evidence—Interpretation of Statutes.*—When it does not appear from the probate of a corporation's deed to lands that the seal affixed is the common seal of the corporation or that it was affixed

EVIDENCE—*Continued.*

by the proper officers of the corporation, it is not a substantial compliance with Revisal, sec. 1005, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. *Withrell v. Murphy*, 82.

7. *Same—Official Acts.*—A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. *Ibid.*

8. *Contracts Written—Parol Evidence — Consideration — Statute of Frauds—Debt of Another—Interests in Lands—Contemporaneous Agreement.*—Plaintiff sold J. certain lands to be paid for at a certain rate per thousand feet of lumber to be cut thereon. The latter sold to defendant, who made a certain cash payment to him in advance, the defendant having no notice that plaintiff owned the land and had reserved a lien on the lumber to secure the purchase price from J. By contracts in writing between plaintiff, defendant, and J., the plaintiff agreed that the payment of the purchase price be made by the defendant from profits made in cutting the lumber at a lower rate per thousand than originally agreed upon with J., which should be paid to plaintiff on the purchase price in behalf of J.: *Held*, evidence was competent to show an oral contract by which defendant was obligated to pay the purchase price for J.; (1) there was a sufficient consideration to support it in the modification of the lien and price per thousand feet of the plaintiff's contract with J., so that defendant could cut the lumber and continue his contract; (2) it was not a promise to answer for the debt of another, Revisal, 974; (3) the agreement was to assume to pay a certain sum of money; it was an executed and not an executory contract to convey an interest in lands required by Revisal, 976, to be written; and, if it had been, the purchaser could not object; (4) it does not alter or contradict the written agreement, but adds a collateral stipulation, and does not appear as having been contemporaneously made. *Rogers v. Lumber Co.*, 108.

9. *Negligence — Evidence — Res Ipsa Loquitur.*—When a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence,

EVIDENCE—*Continued.*

in the absence of explanation by defendant, that the accident arose from a want of care. *Turner v. Power Co.*, 131.

10. *Master and Servant—Employment—Tortious Acts—Authority Implied—Evidence.*—When the master has given direction to his servant, a "hired man," to cut and pile cornstalks in his field, which was done by the servant, and then, without direction from the master, and in his absence he set fire to the stalks, which caused sparks to be carried by the wind, which set fire to and destroyed plaintiff's property, the doctrine of *respondeat superior* does not apply, the thing the master ordered his servant to do being harmless in itself, and there being no express or implied authority given the servant to burn the stalks, which alone caused the damages complained of. *Marlowe v. Bland*, 140.

11. *Contracts—Independent Contractor—Evidence.*—In this action, it appearing that there was sufficient evidence for a finding by the jury for plaintiff upon issues as to whether the servant, whose negligent orders caused the injury was a vice principal, a motion for judgment as of nonsuit upon the evidence upon that ground was properly denied. *Beal v. Fiber Co.*, 147.

12. *Contracts—Independent Contractor — Negligence—Evidence.*—The servant alleging damages in his action against the master as proximately caused by a negligent order of the latter's vice principal, given while erecting a three-story building, there was evidence tending to show: that the servants were engaged in hoisting heavy timbers, and that the usual way to hoist one of them was to place it beneath a "crab" and hoist on a perpendicular; that on the occasion of the injury the rope was fastened to a timber some distance off, giving it a slant and throwing the line beneath and against a rafter which had just before been raised and which rested on the beam where the timbers were to be placed; that in the performance of his duties the plaintiff was standing near the end of this timber preparing to throw the tag rope to a fellow-servant to draw the rafter to its proper place, when the vice principal, without notice or warning, ordered the men at the "crab" to operate it, causing a "crab" rope beneath the timber near which the plaintiff was standing to knock it or pull it off the plate, from which it fell, to the plaintiff's injury; that the plaintiff was not in a position to see or know what was going on, and had no reason to believe the hoist would be ordered at that unusual time: *Held*, sufficient upon the question of negligence. *Ibid.*

EVIDENCE—*Continued.*

13. *Cities and Towns—Streets—Roads—Deeds and Conveyances—Recitals—Boundaries—Rededication — Evidence.*—The plaintiff in his action seeks to compel defendant to remove as an obstruction a house he had erected in an old public road, within the corporate limits of the town, and the town to keep this road open. At this place the proper authorities of the town had changed the road to a new location, and the acts of plaintiff's grantor, binding upon plaintiff, amounted to a dedication of the new road in substitution of the old one. This new road, at the time, affected only the land of plaintiff's grantor, who was also the grantor to the defendant of the land whereon the obstruction complained of was situated: *Held*, the fact that plaintiff's deed calls for the old road as a boundary was merely a matter of description, being copied from some old deeds made when conditions were different, and did not amount to a rededication. *Moore v. Meroney*, 158.

14. *Cities and Towns—Streets—Roads—Dedication — Ratification —Limitation of Actions — Evidence.*—The principle that an abandonment of a public way cannot be presumed, if at all, from nonuse, for any period short of twenty years, has no application where there has been a positive act of dedication and abandonment on the part of the owner, accepted and acquiesced in by the public. *Ibid.*

15. *Habeas Corpus—Certiorari—Supreme Court—Review—Record —Final Judgment—Evidence—Interpretation of Statutes.*—In *habeas corpus* proceedings, where it appears from the application for *certiorari* in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court; and when such fact is disclosed on the hearing, the petition must be remanded. Revisal, sec. 1822 (2), 1827, 1848 (2). *In re Holley*, 163.

16. *Murder—Manslaughter—Self-defense—Deadly Weapon—Willing Acts—Burden of Proof.*—It being admitted that defendant killed deceased with a pistol, it is for him to prove that it was done in self-defense, if that plea is relied on; and an objection that there was not sufficient evidence that he acted willingly is not tenable, the law presuming that he did. *S. v. Simonds*, 197.

17. *Marriage—Seduction—Breach of Promise—Testimony of Prosecutrix—Supporting Evidence — Interpretation of Statutes.*—The testimony of the prosecutrix, on the trial of an indictment for seduction under a promise of marriage, as to the

EVIDENCE—*Continued.*

promise, seduction, and her innocence and virtue, supported by the fact that a child was afterwards born to her, and other evidence tending to show that prior to her alleged seduction she had always been of good character, had led a blameless life, and as a schoolgirl had borne a good reputation with her teacher and schoolmates, together with the admission of the defendant that he promised to marry her before the seduction, is supporting evidence under the statute providing that the unsupported testimony of the woman shall not be sufficient to convict. Revisal, sec. 3354. *S. v. Malonee*, 200.

18. *Marriage—Seduction—Breach of Promise—Evidence—Time.*—In an action for breach of promise of marriage the proof of chastity of the woman should relate to the time preceding the seduction or the date when it became known. *Ibid.*

19. *Marriage—Seduction—Breach of Promise—Engagement—Admission—Supporting Evidence.*—The admission by the defendant to the brother of the prosecutrix of his engagement to be married to her is supporting evidence of the promise of marriage, and sufficient if it fully satisfies the jury of the fact. *Ibid.*

20. *Marriage—Seduction—Breach of Promise—Evidence—Causal Connection—Questions for Jury.*—In the trial of an indictment for seduction under the statute, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse; and in this case it may be inferred by the jury under evidence tending to show the reputation, innocence and virtue of the woman, the seduction under the promise, the prior intimacy and relation of the parties, the birth of the child and its resemblance to the defendant and his flight after indictment. *Ibid.*

21. *Marriage—Seduction—Breach of Promise—Instructions—Weight of Evidence—Questions for Jury.*—The remarks of the judge to the jury upon the flight of the defendant from the State after indictment did not constitute reversible error when considered in connection with all the evidence, as the jury should pass upon the whole evidence and decide what weight should be given the fact of flight, and to what extent the explanatory evidence affected the probative force of the flight as a fact tending to show guilt. *Ibid.*

22. *Bankruptcy—Trustee—Bond—Evidence.*—A certified copy of the bond of a trustee in bankruptcy and the order of the referee approving it is sufficient evidence of the official char-

EVIDENCE—*Continued.*

acter of the trustee named therein and of his right to sue for and recover the property of the bankrupt. *Wilson v. Taylor*, 211.

23. *Bankruptcy—Evidence—Notice.*—In this case there was evidence tending to show that a creditor, to whom her debt had been paid under a clause of preference in a deed of assignment, and which was sought to be recovered by the debtor's trustee in bankruptcy, told the trustee that she was protected by the deed of assignment and admitted to him that she had been informed of her preference as a creditor, and asked and received the money for her debt by virtue of the preference: *Held,* upon any view of the testimony, she had knowledge of facts and circumstances from which the law clearly implies notice. *Ibid.*

24. *Deeds and Conveyances—Trusts and Trustees—Parol Trust—Evidence Sufficient.*—In an action to recover lands, defendant admitted the title to be in plaintiff by virtue of his being a grantee of defendant's sons, to whom the defendant had conveyed it by deed for a good and not for a valuable consideration. To establish the defense of a parol trust thereon in defendant's favor, there was evidence tending to show an absence of consideration moving from the sons to the plaintiff; that antecedent to the plaintiff's deed there was an agreement made between the sons and the plaintiff that the latter would hold the *locus in quo* for the use and benefit of the defendant during his life, and there was evidence in corroboration that plaintiff had, since his deed, leased a portion of the land from defendant and had several times thereafter attempted to lease the land from him; that the lands comprised the homestead of the defendant, and he had continuously been in possession thereof, enjoying the rents and profits: *Held,* the evidence tended to show an agreement entered into prior to the execution of the deed and as a part of it, creating the parol trust, and was sufficient to sustain a verdict for defendant. *Taylor v. Wahab*, 219.

25. *Trusts and Trustees—Parol Trusts—Evidence—Instructions—Questions for Jury.*—Where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for them to say whether it is "clear, strong, cogent, and convincing." *Ibid.*

26. *Same—Evidence—Actionable Negligence — Accident.*—Plaintiff in the line of his duty was sawing at one end logs for the defendant, at its lumber plant, which logs were to be placed on defendant's railroad car by appliances run by steam,

EVIDENCE—*Continued.*

known as a "skidder" and a "loader." The other ends of the logs were sawed by other of defendant's employees, and the negligence complained of was the failure of these other employees to give plaintiff notice that a log, which rolled upon plaintiff, to his injury, was about to do so. There was no evidence that plaintiff was a part of a train crew or directly engaged in operating the "skidder" or the "loader": *Held*, the Fellow-servant Act, Revisal, sec. 2646, has no application. *Semble*, the injury resulted from an accident, and there was no actionable negligence shown on the part of the defendant. *Twiddy v. Lumber Co.*, 237.

27. *Master and Servant—Safe Place to Work—Negligence—Evidence.*—A servant having brought his action against his master for damages arising from the latter's alleged negligence in permitting a hole to remain in a passway on a platform where the former was required to work, the defendant's testimony that the hole had been repaired by placing boards over it, and that the injury complained of was caused by plaintiff's stumbling and breaking a board, and that there were thicker boards at defendant's plant, and the one used was not thick enough, is some evidence that the passway was unsafe after the repairs were made. *Harvell v. Lumber Co.*, 254.

28. *Negligence—Proximate Cause—Evidence—Nonsuit—Questions for Jury.*—In an action for damages by the servant against the master for the latter's alleged negligence in permitting a hole to remain in a passway over a platform at his lumber plant where the plaintiff was required to go in the discharge of his duties, there was evidence on behalf of plaintiff tending to show: that he had some time before informed the defendant of the defect, and it had promised to remedy it; that plaintiff in discharge of his duties was going along the passway with an empty truck, weighing 115 pounds, on his shoulder, groping his way with his right hand along defendant's kiln, in the smoke from defendant's kilns, which rendered him unable to see the hole, though he knew it was there; that he would have had to wait about fifteen minutes before the smoke would have cleared away, but had he waited he would have been discharged: *Held*, it was a question for the jury as to whether the plaintiff acted as a man of ordinary prudence, and a motion by defendant to nonsuit upon the evidence was properly denied. *Ibid.*

29. *Negligence—Evidence—Harmless Error.*—As tending to show notice to the master of a negligent defect at a place where

EVIDENCE—*Continued.*

the servant was required to go in the discharge of his duties, the plaintiff testified that he told the defendant's foreman thereof, and that the defendant's president said for the foreman to have it fixed; that in reply the foreman bowed his head: *Held,* it was not reversible error for the plaintiff to testify what he understood by the act of the foreman in bowing his head—that it made him think the hole would be fixed—it being germane to the question of plaintiff's contributory negligence in continuing to work in the presence of a known danger; or harmless error at least, the act necessarily indicating an assent. *Ibid.*

30. *Innkeepers — Guests — Contributory Negligence — Evidence — Questions for Jury.*—In this case there was evidence tending to show that the plaintiff, a guest at defendant's hotel, was shown into a bedroom wherein there was a defective gas fixture by which a light was furnished to the occupant, by reason of not having a safety-pin to prevent the turning of the key all the way around, and that the gas fixture was not safe in consequence; that before retiring for the night the plaintiff discovered the absence of this safety-pin, but turned the key to where it should have stopped, and could smell no gas escaping, and thereupon he retired, but was injured by asphyxiation that night when asleep: *Held,* a motion to nonsuit was properly denied, there being evidence of defendant's negligence; and it was for the jury to say whether, according to the rule of the prudent man, the plaintiff was guilty of such contributory negligence as would bar his recovery. *Patrick v. Springs,* 270.

31. *Husband and Wife — Tenants in Common — Partition — Evidence.*—When lands are purchased by the husband, and under his instruction are conveyed to him and his wife, jointly, by deed of bargain and sale, with full covenants of warranty, the doctrine of survivorship is not affected by the fact that the lands so purchased were a part of lands conveyed by his father, W., to a guardian for the benefit of the children of W., there being no evidence upon the face of the deed to the husband that it was made in pursuance of a scheme to divide lands held in common among the children of W. *Harrington v. Rawls,* 131 N. C., 40; 136 N. C., 65, and *Sprinkle v. Spainhour,* 149 N. C., 224, cited and distinguished. *Morton v. Lumber Co.,* 278.

32. *Deeds and Conveyances — Parent and Child — Parol Trust — Wills—Paper-writing—Evidence.*—A husband purchased certain lands and had the deed made to his wife, who there-

EVIDENCE—*Continued.*

after by a proper deed, with her husband, conveyed the land to their son in fee simple. The plaintiff, their daughter, sought to impress the lands with a parol trust in her favor: *Held*, the will of her deceased father and a paper-writing executed by him, purporting to show that the title to the land was put in the son only for the purpose of an equitable division, were incompetent evidence; and therefore it was irrelevant to prove that such papers had been executed and destroyed in pursuance of a conspiracy to defraud plaintiff of her rights. *Ricks v. Wilson*, 282.

33. *Executors and Administrators — Accounting — Parties—Procedure—Evidence.*—The plaintiff alleges that her father died in possession of a large amount of personal property, which the defendants, her mother and brother, had wrongfully appropriated. The plaintiff and her brother were the only children and heirs at law. The mother was the executrix of her husband, but was not made a party in her administrative capacity in this action, the purpose of which was to establish a trust in plaintiff's favor, in her father's land: *Held*, the plaintiff is not entitled to an accounting; her remedy in that respect is to bring an action against the administratrix and her brother, the other heir at law, for an accounting and settlement of the estate, wherein evidence may be offered as to sums of money or other property which the administratrix has received or should have received, and with which she is properly chargeable. *Ibid.*

34. *Timber Deeds—Wrongful Cutting—Questions—Evidence—Record.*—While the court does not commend the questions asked in this case to ascertain the damages to the land by reason of the grantee in a timber deed cutting timber less than the size allowed by the deed, they are considered in connection with the other parts of the record, especially the judge's charge, and no reversible error is found. *Williams v. Lumber Co.*, 306.

35. *Counties—Boundary Line — Location — Legislative Powers—Courts.*—Since the institution of this action to apportion to Washington and Tyrrell counties taxes on a railroad bridge over Albemarle Sound from one county to the other, a legislative enactment declaring the line to be in the middle of the sound is held as controlling the question. *R. R. v. Washington*, 333.

36. *Application for License — Conspiracy — Evidence.*— The Supreme Court has complete jurisdiction over the granting of

EVIDENCE—*Continued.*

licenses to practice law; and when the Court has under consideration the question of granting a license to an applicant, and issues a citation to certain persons to appear, and in compliance therewith they do appear and file affidavits relevant to the inquiry and affecting the character of the applicant, no evidence of conspiracy is shown, the defamatory matters contained in the affidavits being absolutely privileged, and called for by the Court in the progress of the inquiry. *Baggett v. Grady*, 342.

37. *Deeds and Conveyances — Intent of Grantor — Declarations—Parol Evidence—Reformation—Mutual Mistake.*—The grantor's declaration as to his intent cannot affect the location of lines expressed in his deed where the reformation of the deed on the ground of mutual mistake is not sought in the action. *Sherrod v. Battle*, 345.

38. *Deeds and Conveyances—Boundaries—Ditches—Evidence, Conflicting—Lines—General Direction—Course.*—A disputed divisional line between adjoining lands of the parties was made to depend upon a description in a conveyance, as follows: "Beginning at the head of a ditch on the E. and T. road, running with said ditch in an eastern direction to a branch, thence with said branch to the edge of G. Swamp, thence due east to the canal," etc. The beginning point and the line from there to the second call in the deed were not disputed, but there was evidence tending to show a continuation of the ditch in two directions; that one was a lead ditch continuous from the beginning corner, with the other emptying into it, the latter extending in an eastern direction, and that, by following either, the calls in the deed might be met: *Held*, (1) it was for the jury to say which of these ditches was called for in the deed, and the one so found would control course and distance; (2) the call for the line, "running with the ditch in an eastern direction," was not controlling so as to exclude a line running with one of the ditches in a general eastward direction, because it varied its course, sometimes east, northeast, and even north, in favor of the other running more nearly in an eastern direction. *Ibid.*

39. *Same—Deception—Fraud—Principal and Agent — Ratification —Evidence.*—The title to the disputed land was in plaintiff, unless she is estopped by her acts respecting an agreement upon a line as incorporated in a deed made to a third party, Mrs. M., the latter of whom acted through her husband M., in its purchase. The evidence disclosed that M. and defend-

EVIDENCE—*Continued.*

ant agreed that a certain line should divide the *locus in quo* from the land to be conveyed by plaintiff to Mrs. M.; that the plaintiff was unaware of this agreement and took no part in it, and, further, was unaware at the time of the transaction that she owned the land now in dispute; that before she signed the deed to Mrs. M., M. told the plaintiff that he had agreed with defendant on a line between the two lots, and the agreement was referred to in the deed to his wife; that M., in his transactions with the defendant, did not act as the agent of the plaintiff or represent her: *Held*, there was no element of an equitable estoppel against plaintiff's claiming the land; (1) there was no evidence of any loss by defendant arising from the acts complained of; (2) M. and defendant attempted to change a line, and not to determine upon and settle a disputed one; (3) there was not the element of intentional deception or fraud or conduct calculated to mislead defendant to his prejudice, indicated by the evidence as to plaintiff's acts, or any evidence of ratification by plaintiff of the acts of M. The principle of equitable estoppel discussed by WALKER, J. *Boddie v. Bond*, 359.

40. *Evidence — Nonsuit — Defendant's Evidence.*—Evidence introduced by defendant cannot be considered for him on his motion to nonsuit the plaintiff upon the evidence, and it was reversible error for the trial judge to permit defendant to introduce a deed pertinent to the inquiry during the taking of plaintiff's testimony and consider it in granting defendant's motion. *Ibid.*

41. *Railroads—Fire—Right of Way—Evidence — Nonsuit.*—In an action for damages to plaintiff's land alleged to have been caused by fire communicated to its foul right of way and from thence to plaintiff's land, there was evidence tending to show that when first discovered the fire was burning down the county road, off the right of way, and 100 yards from the railroad; that on the right of way, which had been burned over, from 30 to 50 feet from the track, there were "chunks" smoking as if they had just been burned, with no evidence to indicate the character of the "chunks," or that they constituted combustible material, and nothing to indicate that the fire originated there: *Held*, evidence insufficient, and a judgment of nonsuit upon defendant's motion should have been allowed. *Maguire v. R. R.*, 384.

42. *Evidence—Conjecture—Nonsuit.*—When the evidence raises no more than a mere conjecture as to defendant's negligence, it is error to submit the case to the jury. *Ibid.*

EVIDENCE—*Continued.*

43. *Railroads — Negligence — Burning — Evidence.*— In an action against a railroad company to recover damages for burning the plaintiff's house, alleged to have been negligently caused by sparks from the defendant's engine, the judge correctly instructed the jury, in substance, that if the house caught fire from sparks which were emitted from the engine, it made out a *prima facie* case of negligence, but they would not find against the defendant upon the issue if they concluded, after consideration of all the proof, that the defendant's engine had a spark arrester, not the best, but of approved make and in general use, and that the train was carefully handled, so that there was no negligence on the defendant's part. *Kornegay v. R. R.*, 389.

44. *Evidence—Irrelevant Questions—Harmless Error.*—During the examination of the plaintiff in this case an inquiry by the court, "You had a pretty big piazza, didn't you?" was held irrelevant and harmless, the action being to recover damages of the defendant railroad company for negligently setting fire to and destroying plaintiff's house by sparks from its locomotive. *Ibid.*

45. *Same—Railroads—Burning.*—On the question of defendant's negligence in permitting sparks from its engine to set fire to and destroy plaintiff's house, the defendant's counsel asked a witness where the engineer was when he last heard from him, and the question was excluded: *Held*, the inquiry was irrelevant, no other evidence appearing to make it competent. *Ibid.*

46. *Master and Servant — Evidence — Instructions.*—The plaintiff was employed by the defendant to dig in a sand pit 13 feet long, 8 feet wide at the top and 8 feet deep. There was evidence for defendant tending to show that there was no danger in digging in the pit if the sides were "flammed" or sloped, and that in violation of instructions the plaintiff continued to dig straight down or undermine the side, and in consequence it caved in on him to his injury: *Held correct*, an instruction tendered by defendant in substance, that if they believed the evidence of defendant they should answer the first issue, as to defendant's negligence, "No"; and it was error to so modify the instruction as to make their answer to the issue depend upon whether the plaintiff, while in the pit, could see and appreciate his surroundings when digging in disobedience to his instructions. *Flanner v. Cotton Mills*, 394.

47. *Master and Servant—Appliances—Damages—Evidence—Questions for Jury.*—While plaintiff was striking with a sledge

EVIDENCE—*Continued.*

hammer a chisel held by defendant's boiler-maker while cutting slack rivets from a boiler, in the course of his employment, a piece of the chisel, under a blow from the hammer, flew off and injured the plaintiff's eye, causing the damage alleged in the action. There was evidence tending to show that it was the duty of the boiler-maker, whom plaintiff was employed to assist, to keep the tools in repair; that plaintiff had been working as his assistant for about a month, and that he handed a chisel to plaintiff to use, which the latter did without opportunity for inspection; that the head of the chisel was too large, and the chisel itself too thin, etc.; that plaintiff struck with the hammer when and as directed by the boiler-maker: *Held,* under the rule, viewing the evidence in its most favorable light for the plaintiff, the question as to defendant's negligence was one for the jury to determine. *Martin v. Mfg. Co.,* 128 N. C., 264, cited and distinguished. *Mercer v. R. R.,* 399.

48. *Insurance—Policies — Assignment — Insurable Interest—Good Faith—Affection—Knowledge—Evidence.*—When in an action to recover upon a life insurance policy by an assignee thereof there are appropriate issues as to the good faith of the assignee or beneficiary in paying the premiums, and whether the interest of the assignee was an insurable one, evidence is competent, upon the question of good faith in the assignments, which tends to show the affectionate relationship between him and the insured, that the insured regarded him as a son, and that he knew nothing of the transaction before the policy and its assignment to him were brought to him by the agent of the company. *Hardy v. Insurance Co.,* 430.

49. *Insurance—Policies—Assignment — Waiver — Payment of Premiums—Wagering Policy—Knowledge—Evidence—Valid Contract.*—The agent of the defendant insurance company solicited and procured from insured applications for several policies of insurance, with the agreement that his children should pay the premiums thereon. When the policies were delivered to insured it was found that one of the children would not pay the premiums on one of them, and the insured told the agent he wished plaintiff to have the policy. The agent said that the plaintiff did not have an insurable interest, but for insured to take the policy, have it payable to his estate, and assign it to plaintiff, which was done accordingly, with knowledge thereof given to the defendant company, which sent the policies and assignment blanks to the agent, who had them executed and delivered them to the plaintiff, theretofore unaware of the transactions, and he continued to

EVIDENCE—*Continued.*

pay the premiums to the company for four years: *Held*, it was too late for the company to object to the validity of the assignment and the payment of the premiums by the plaintiff, after the maturity of the policy. *Ibid.*

50. *Evidence — Common Law — Sister States — Presumptions.*—In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister State, except in those States whose jurisprudence is not founded on the common law. *Miller v. R. R.*, 441.

51. *Evidence—Sister States—Laws — Judicial Notice.*—The courts will not take judicial notice of the statutes and laws in the different States which may have changed the common law. *Ibid.*

52. *Evidence—Sister States—Laws—Burden of Proof—Procedure.* The proof of the laws of another State must be shown in evidence by the party relying upon them, and the methods of proof and the competency of evidence is regulated by statute. Revisal, sec. 1594. *Ibid.*

53. *Deeds and Conveyances — Common Source — Superior Title—Evidence.*—When the title to the land in controversy is claimed by both parties from a common source, the older title will prevail unless there is shown a better title from the one under whom both claim, or from some other person. *Bowen v. Perkins*, 449.

54. *Deeds and Conveyances—Common Source—Inconsistent Title—Evidence.*—One who enters into possession of lands under a contract to purchase creates a relationship with the owner analogous to that of tenant and landlord; and until ousted or disturbed in his possession by one having a paramount title, he will not be permitted in an action for possession by the party under whom he entered to set up a title inconsistent with his. *Ibid.*

55. *Contracts—Breach — Goods Sold — Damages — Defects — Evidence.*—The defense, in an action for damages on defendant's refusal to accept certain yarns, sold under contract, being that the yarns were defective, it was competent to show by plaintiff's correspondence in this case matters relating to such defects, in corroboration of defendant's witness; and, also, in reply to plaintiff's evidence that yarns of the character refused by defendant were sent to plaintiff's other customers without complaint made. *Cotton Mills v. Hosiery Mills*, 462.

EVIDENCE—*Continued.*

56. *Negligence — Defective Machinery — Subsequent Defects—Evidence.*—When the defendant has testified, in an action by its employee for damages alleged from the furnishing and use of a defective machine, that the machine had not been changed since the injury and no other injury had been thereby inflicted, it is competent for the plaintiff to show, as evidence of defendant's negligence, that the defect still exists. *Norris v. Mills*, 474.

57. *Master and Servant—Defective Machine—Contributory Negligence—Evidence—Instructions.*—In an action by an employee to recover damages of his employer for a personal injury received in operating a planing machine in defendant's mill, there was evidence tending to show that the machine had revolving cogs operated by steam power, which were left unboxed and exposed, and that a feed gear or shift by which the power was applied and shut off was defective, all of which had been called to defendant's attention. The plaintiff admitted the necessity of shutting off the power before attempting to relieve a choked condition of the machine, and there was contradictory evidence as to whether he waited, after shutting off the power, until the wheels stopped revolving, before attempting to clear the machine, wherein the injury was inflicted: *Held*, the conflict of evidence presented an issue of fact to the jury, and it was error to refuse to instruct the jury that plaintiff was guilty of contributory negligence, should they find that he placed his hand in the machine before the cogs stopped revolving, after he had shut off the motive power, and was thereby injured. *Bryan v. Lumber Co.*, 485.

58. *Advancements—User—Damages — Declarations — Evidence.*—Declarations of the intestate as to the value of lands conveyed his sons as advancements made after the date of the deeds: *Held*, in this case, incompetent, and not sufficient to charge one of the sons, who had theretofore for some years had the use of the lands, with the value of timber he had then cut therefrom. *Tart v. Tart*, 502.

59. *Usury — Contracts — Fraudulent Intent — Proof.*— When the lender of money intentionally charges the borrower a greater rate of interest than the law allows, and his purpose stands clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. *Riley v. Sears*, 509.

60. *Railroads—Negligence — Evidence, Nonexpert — Questions for Jury.*—In an action for damages caused by defendant's pass-

EVIDENCE—*Continued.*

ing locomotive emitting a spark which destroyed plaintiff's dry-kiln by fire, recovery was resisted upon the ground that the locomotive was properly equipped and handled, and that the fire originated within the kiln by the overheating of the steam pipes, and that heat ascends, and consequently fire would break out in the top of the kiln first: *Held,* the opinion of witnesses was incompetent as nonexpert evidence, which was to the effect that the pipes could not have caused the fire as stated, it being the very question the jury was to decide, and in which they could draw their own inferences from the evidence. *Deppe v. R. R.,* 523.

61. *Divorce a Mensa—Abandonment—Wife's Conduct—Burden of Proof.*—The wife in showing abandonment, by her husband's conduct in compelling her to leave home, in her action for divorce must also show that his cruel conduct was unwarrantable, and not the proximate cause of her own acts done at the time. *Dowdy v. Dowdy,* 555.

62. *Divorce a Mensa—Issues—Misconstruction—Wife's Conduct.*—In this action for divorce issues were submitted upon the question of the husband's abandonment and that of the indignities to the wife's person such as would render her condition intolerable, etc.: *Held,* a third issue, "Was the plaintiff a dutiful wife and without blame on her part?" was too broad, and open to misconstruction. *Ibid.*

63. *Lands—Title — Legitimacy — Declarations — Court Records—Secondary Evidence.*—The plaintiff sued for possession of lands, and her title thereto depended solely upon her legitimacy. It was proper to exclude the evidence of a witness, who was a juror in a former action wherein the defendant was not a party, which was offered for the purpose of showing that therein the jury found the question of legitimacy in plaintiff's favor, there being no evidence, among other reasons, that the court record had been lost or destroyed. *Rollins v. Wicker,* 559.

64. *Same.*—Only duly exemplified and authenticated copies of the records in judicial proceedings are competent to prove their contents, and parol evidence of their contents is secondary and inadmissible evidence unless the original record is lost or destroyed or cannot be produced. *Ibid.*

65. *Evidence—Declarations — Legitimacy — Ante Litem Motam.*—Declarations of deceased persons as to the legitimacy of the plaintiff, offered in an action involving that question, are incompetent if not made *ante litem motam.* *Ibid.*

EVIDENCE—*Continued.*

66. *Same—Time.*—For declarations of deceased persons to be competent with respect to their having been made *ante litem motam*, they must be free from suspicion of bias and must have been made before the beginning of the controversy, which is not necessarily the commencement of the action; and testimony of such persons given at a former trial involving the same questions as in the present one is incompetent. *Ibid.*

67. *Evidence—Objections and Exceptions.*—A general objection to evidence which is partly competent cannot be sustained; the objection should specify the grounds thereof and be confined to the incompetent evidence. *Ibid.*

68. *Evidence — Legitimacy — Declarations—Ante Litem Motam—Pedigree—Independent Recollection.*—In an action for possession of land, wherein plaintiff's title depended solely upon her legitimacy, objection was made by her to the testimony of defendant's witness, who stated that he remembered the time of the marriage; that plaintiff's mother (now deceased) came through his yard "that morning and said she had been married that day," and that plaintiff was then 2 or 3 years old. The evidence held competent, as a declaration relating to pedigree, it having been made by the mother *ante litem motam*, and being her spontaneous exclamation as to an event then uppermost in her mind, was free from any suspicion of error; besides, the mother's declaration was a circumstance which tended to fix in the witness's mind the fact that, at that time, he had knowledge of the marriage and of plaintiff's age. *Ibid.*

69. *Evidence—Negative of a Positive Character.*—Evidence negative in form may partake of an affirmative character, as when a witness testifies to listening for approaching locomotives at a railroad crossing and not hearing one, or the usual signals, such as ringing the bell or blowing the whistle, etc. *Wolfe v. R. R.*, 569.

70. *Negligence—Evidence—Instructions.*—In this action for damages for personal injuries the usual and appropriate issues of negligence, contributory negligence, and the last clear chance were submitted under evidence tending to show that plaintiff, while walking on defendant's track, became unconscious, and was injured by defendant's train under circumstances in which the engineer could have seen his condition in time to have avoided the injury, and it was held that the instructions given by the court were not erroneous, under *Sawyer's case*, 145 N. C., 24, and other like cases. *Guilford v. R. R.*, 607.

EVIDENCE—*Continued.*

71. *Lottery—Chance—Hazard—Evidence.*—It appears that the defendant in this case, indicted for conducting a lottery, had formed a club of fifty members, each of whom entered into an agreement with defendant and paid in their money from time to time, with the hope and expectation that they would be so fortunate or lucky as to win by lot a suit of clothes worth a sum greatly in excess of the amount paid by him. After their thirteenth drawing, every member, who was not lucky enough to draw a prize sooner, was immediately entitled to a suit, if he had paid as agreed, but in the event of default in any two of these payments, consecutively, it was optional with the defendant to cancel the certificate of membership: *Held,* (1) the plan or scheme was a lottery within the meaning of the statute; (2) the certificate of membership was competent evidence to show the nature and form of the transaction in order to determine as to its legality. *S. v. Perry,* 616.

72. *Spirituous Liquors—Sale — Evidence — Declarations—Competency—Ex parte.*—Upon a trial for unlawfully selling whiskey, there was evidence tending to show a conversation overheard at the time of the alleged sale by the witness, a policeman, between the defendant and one S., whom the witness had employed to buy the whiskey with a dollar marked for identification: *Held,* competent as tending to prove the guilt of the accused by his own declarations; but that it was incompetent for the defendant to show later declarations of S. as to what occurred during the conversation testified to, in corroboration of defendant's testimony that he gave S. the whiskey for his sick wife and only changed the dollar for him. *S. v. Hopkins,* 622.

73. *Spirituous Liquors—Procuring Sale—Police Officers—Evidence —"Connivance."*—In this case, the methods employed by the policeman to obtain conviction of the defendant for unlawfully selling the whiskey, *Held* not to affect the judgment. *S. v. Smith,* 152 N. C., 798, cited and approved. *Ibid.*

74. *Murder, First Degree—Evidence Sufficient.*—The evidence in this case tended to show that the deceased, a chief of police of a town, went with a posse to arrest the prisoner at the latter's home at night; that he called the prisoner to come to the door; that the prisoner recognized the deceased as the chief of police and knew he had a warrant for his arrest; that the deceased waited about twenty to twenty-five minutes for the prisoner, who said he first wished to put on his shoes,

EVIDENCE—*Continued.*

and then asked the prisoner to come on, he was in a hurry; that the prisoner then said he was not coming, as deceased had a warrant for his arrest, and that then, at the prisoner's direction, his wife opened the door, as all of the lights went out, when the prisoner fired a gun directly into the breast of the officer, inflicting a wound from which he soon thereafter died. Under a correct charge, wherein the crime of murder in the first degree was defined: *Held*, evidence sufficient for conviction of murder in the first degree. *S. v. Lewis*, 632.

75. *Fertilizers — Indictment—Evidence—Conviction.*—The defendant was tried for selling cotton-seed meal for fertilizer in violation of Revisal, 3597, under an indictment which followed the language of the statute, and the evidence showed that the defendant sold the meal in sacks upon which there were no tags or other indication of the weight of the sacks or the chemical composition of their contents, or other data respecting them, as required by the statute: *Held*, the indictment sufficient in form and the evidence fully justified a conviction, and the fact that the purchaser exchanged cotton seed for the meal was not material. *S. v. Oil Co.*, 635.

76. *Spirituous Liquors — Unlawful Sale—Abettors—Evidence—Instructions.*—Upon trial for violating the general prohibition law in the sale of whiskey, a charge upon supporting evidence was held correct in substance as follows: That if the jury should be satisfied from the evidence that H. owned the whiskey and brought it in a basket to defendant's home for the purpose of selling it there, and sold a pint to one D. in defendant's presence and with his knowledge, the defendant would be guilty of aiding and abetting the sale, and that as in misdemeanors all aiders and abettors are principals, the defendant would be guilty as a principal in the unlawful sale. *S. v. Denton*, 641.

77. *Spirituous Liquors—Unlawful Sale—One Act—Abettors—Evidence Sufficient.*—One is guilty of an unlawful sale of spirituous liquor as a principal when he allows the use of his home for the latter to more secretly effect the sale there; and evidence tending to show that this was done and the price paid while at defendant's home in a room wherein he was lying on a lounge, though without evidence of his receiving a part of the price paid, is sufficient for his conviction as a principal in aiding and abetting the unlawful act. *Ibid.*

EVIDENCE—*Continued.*

78. *Navigable Streams—Obstruction—Evidence—Burden of Proof.* To maintain an indictment for obstructing a canal, it must be shown that the canal was a navigable stream. *S. v. Cedar Works*, 649.

EXCUSABLE NEGLECT. See Appeal and Error, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Insurance Orders—Sick Benefits—Personal Rights—Restrictive Liability — Beneficiaries — Executors and Administrators.*—The member of an insurance order becomes entitled, as a matter of right, to the sick benefits accruing to him under his policy of insurance, and upon his death without having received payment thereof the cause of action against the order survives and is enforcible under Revisal, sec. 415; and when the constitution of the order provides that the "benefits are rights personal to the member, his family and dependent relatives, and are not payable to the legal representatives of a member's estate," the personal representatives of the deceased member may maintain his action against the order to recover the benefits, when there are none who belong to the named classes to take; and the amount recovered will go into the intestate's estate for distribution or disbursement as required by the statute. *Kelly v. Trimont Lodge*, 97.

2. *Executors and Administrators—Accounting — Parties—Procedure—Evidence.*—The plaintiff alleges that her father died in possession of a large amount of personal property, which the defendants, her mother and brother, had wrongfully appropriated. The plaintiff and her brother were the only children and heirs at law. The mother was the executrix of her husband, but was not made a party in her administrative capacity in this action, the purpose of which was to establish a trust in plaintiff's favor, in her father's land: *Held*, the plaintiff is not entitled to an accounting; her remedy in that respect is to bring an action against the administratrix and her brother, the other heir at law, for an accounting and settlement of the estate, wherein evidence may be offered as to sums of money or other property which the administratrix has received or should have received, and with which she is properly chargeable. *Ricks v. Wilson*, 282.

3. *Executors and Administrators—Personalty—Deceased Widow —Distributive Share — To Whom Payable.*—The intestate died, leaving children by a former marriage and a widow, who subsequently died intestate. An administrator of her estate qualified, and was made a party in an action between

EXECUTORS AND ADMINISTRATORS—*Continued.*

the husband's heirs at law for division of his property, in which his administrator was also a party: *Held,* in this case the share of the deceased widow in her husband's personal property should be paid to her administrator. *Tart v. Tart,* 502.

4. *Taxation—Enforcement—Executors and Administrators—Parties—Procedure—Priorities.*—It is the duty of an executor or administrator to pay the taxes of deceased out of the trust funds in his hands, and the statute prescribes that "such liability may be enforced by an action against him in the name of the sheriff," Revisal, sec. 2862, giving certain priorities prescribed by Revisal, sec. 89. *Sherrod v. Dawson,* 525.

EXPERT EVIDENCE. See Evidence.

EXPIRATION FOR CUTTING. See Deeds and Conveyances.

EXPRESS AGREEMENT. See Contracts, 34.

FACTOR'S LIENS. See Liens, 1.

FEES. See Courts, 4; Appeal and Error, 3.

FEE SIMPLE. See Wills, 5.

FELLOW-SERVANT. See Railroads, 1, 2, 3, 4, 7.

FERTILIZERS. See Damages, 13; Penalty Statutes, 9, 10, 11.

FINDINGS. See Reference, 5.

FIRE DEPARTMENT. See Cities and Towns, 21, 22.

FORBEARANCE TO SUE. See Contracts, 33, 34, 35.

FORECLOSURE. See Mortgage, 6.

FOREIGN CONTRACTS. See Jurisdiction, 3.

FOREIGN CORPORATIONS. See Corporations, 10.

FRAUD. See Partnership, 1; Bankruptcy, 6; Usury, 7.

1. *Contracts—Acceptance—"Final Estimate" of Work—Fraud in Law—Intent—Instructions—Right of Action.*—The plaintiff was a subcontractor of defendant, which was in turn a subcontractor of M. & Co., to build a railroad, the contract between M. & Co. and the original contractor, which was binding upon plaintiff, providing that the latter's engineer should certify that the work had been performed and accepted by the engineer. It was set up as a defense that the plaintiff could not maintain his action until the certificate had been

FRAUD—*Continued.*

obtained. It was found by the jury, in response to appropriate issues, that a "final estimate" had been rendered the plaintiff by M. & Co., but was grossly inadequate: *Held*, (1) not error for the court to instruct the jury that if the estimate referred to contained such error of judgment as amounted to a mistake so gross as to necessarily imply bad faith, and to amount to fraud upon the rights of plaintiff, it was unnecessary to show the intention to commit a fraud or to act in bad faith, the court having correctly charged as to what constitutes legal fraud; (2) the jury having found that plaintiff had legal excuse to bring his action, a judgment in his favor will not be disturbed. *McDonald v. MacArthur*, 122.

2. *Same—Deception—Fraud—Principal and Agent—Ratification—Evidence.*—The title to the disputed land was in plaintiff, unless she is estopped by her acts respecting an agreement upon a line as incorporated in a deed made to a third party, Mrs. M., the latter of whom acted through her husband M., in its purchase. The evidence disclosed that M. and defendant agreed that a certain line should divide the *locus in quo* from the land to be conveyed by plaintiff to Mrs. M.; that the plaintiff was unaware of this agreement and took no part in it, and, further, was unaware at the time of the transaction that she owned the land now in dispute; that before she signed the deed to Mrs. M., M. told the plaintiff that he had agreed with defendant on a line between the two lots, and the agreement was referred to in the deed to his wife; that M., in his transactions with the defendant, did not act as the agent of the plaintiff or represent her: *Held*, there was no element of an equitable estoppel against plaintiff's claiming the land; (1) there was no evidence of any loss by defendant arising from the acts complained of; (2) M. and defendant attempted to change a line and not to determine upon and settle a disputed one; (3) there was not the element of intentional deception or fraud or conduct calculated to mislead defendant to his prejudice, indicated by the evidence as to plaintiff's acts, or any evidence of ratification by plaintiff of the acts of M. The principle of equitable estoppel discussed by WALKER, J. *Boddie v. Bond*, 359.

3. *Legislature—Contracts—Promise to Work—Advances—Intent—Fraud.*—To convict under Revisal, sec. 3431, for obtaining money upon and by color of any promise to begin any work and unlawfully and willfully failing to commence or complete the work according to the contract, without lawful excuse, it is necessary to show the fraudulent intent on the

FRAUD—*Continued.*

part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. *S. v. Griffin*, 611.

4. *Same—Rational Connection.*—For a presumption from the evidence, created by a legislative enactment, to be valid there must be some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another fact shall not be so unreasonable as to be a purely arbitrary mandate. U. S. Constitution, Fourteenth Amendment. *Ibid.*

5. *Same—"Due Process"—Imprisonment for Debt—Peonage.*—In order for a conviction under Revisal, sec. 3431, it is necessary to show a contemporaneous fraudulent intent and purpose to obtain money under a promise to commence and complete certain work. *Ibid.*

6. *Same — Interpretation of Statutes — Constitutional Law.*—A statute which makes mere failure to do the work or perform the contract presumptive evidence of fraudulent intent, upon which a person may be convicted and imprisoned, is violative of the Thirteenth Amendment to the Federal Constitution, and is in conflict with our own State Constitution prohibiting imprisonment for debt except in case of fraud. *Ibid.*

FRAUDS, STATUTE OF. See Contracts, 4, 31, 32, 35.

GOODS SOLD. See Sales, 3, 4.

GRANTS. See Evidence, 4, 5.

GRATUITOUS BAILEE. See Spirituous Liquors, 4.

GUARANTOR OF PAYMENT. See Contracts, 32, 33, 34, 35.

GUESTS. See Innkeepers, 1, 2.

HABEAS CORPUS.

1. *Habeas Corpus—Children—Appeal and Error—Procedure.*—Except in cases concerning the care and custody of children, there is no appeal from a judgment in *habeas corpus* proceedings. Revisal, sec. 1854. *In re Holley*, 163.

2. *Habeas Corpus—Supreme Court—Certiorari—Review—Procedure—Constitutional Law.*—In *habeas corpus* proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the Constitution, Art. IV, sec. 8, under the power given to this

HABEAS CORPUS—*Continued.*

Court "to issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts." *Ibid.*

3. *Same—Appeal and Error.*—The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in *habeas corpus* proceedings in matters not involving the care and custody of children, Constitution, Art. IV, sec. 8, shall only be exercised by *certiorari*, and the jurisdiction cannot be acquired by appeal upon exception and error assigned. *Ibid.*

4. *Habeas Corpus—Certiorari—Supreme Court—Review—Record —Final Judgment—Evidence—Interpretation of Statutes.*—In *habeas corpus* proceedings, where it appears from the application for *certiorari* in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court; and when such fact is disclosed on the hearing, the petition must be remanded. Revisal, sec. 1822 (2), 1827, 1848 (2). *Ibid.*

5. *Same—"Final Judgment"—Definition—Words and Phrases.*—The term "final judgment or decree of a competent tribunal" wherein the Supreme Court will not issue a *certiorari* to review a judgment entered in *habeas corpus* proceedings, refers only to judgments authorized by the law applicable to the case in hand; and when it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the same and was manifestly without power to enter the judgment or to impose the sentence in question, there is no final sentence of a competent tribunal. *Ibid.*

6. *Habeas Corpus — Certiorari — Supreme Court — "Competent Jurisdiction"—Definition—Words and Phrases—Interpretation of Statutes—Constitutional Law.*—The term, "competent jurisdiction," used by the Revisal, sec. 1822, in making an exception to the power of this Court to review a judgment in *habeas corpus* proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional. *Ibid.*

HABEAS CORPUS—*Continued.*

7. *Habeas Corpus — Supreme Court — Certiorari—Jurisdiction—Value of Goods Stolen—Sentence—Burden of Proof—Indictment—"Aggravation"—"Hardened Offender"—Interpretation of Statutes.*—It appeared in the record in this case that defendant, suing out a *certiorari* in the Supreme Court in *habeas corpus* proceedings, was sentenced for a term of five years, of which he has served eighteen months; that he had been indicted for stealing goods to the value of $10; that therefore he had, on separate occasions, been convicted for shooting a man, for retailing, and for larceny, in all of which judgment was suspended, but all of them had gone off the docket; that in the present proceedings the judgment cited the former convictions and that it had been made to appear that the stolen goods were worth between $250 and $300. It was contended by petitioner that under our statutes, Revisal, secs. 3500, 3506, a sentence for more than one year is illegal: *Held*, (1) the amount alleged in the bill of indictment (here $10) is not conclusive on the question of punishment; (2) the amount or value of the stolen property is not now an essential ingredient of the crime of larceny, and it is only a matter of amelioration of the punishment, to be raised and determined at the instance of defendant as an issue of fact on the trial; and therefore there is no indication on this record and judgment that the sentence was not within the power of the court that imposed it; (3) that the record and judgment showed a case "of much aggravation or of hardened offenders," where, in the discretion of the court, a sentence not exceeding ten years may be imposed. *Ibid.*

8. *Larceny, Petty—Punishment—Interpretation of Statutes.*—At common law petty larceny was regarded as an infamous offense and subject to corporal punishment; and, except as modified by Revisal, secs. 3500, 3506, the punishment would, in all cases, be imprisonment for not less than four months nor more than ten years. Revisal, secs. 3292, 3293. *Ibid.*

"HALF BLOOD." See Descent and Distribution, 2.

"HARDENED OFFENDER." See Interpretation of Statutes, 8.

HARMLESS ERROR.

1. *Marriage — Seduction — Breach of Promise — Instructions — Harmless Error.*—In the trial of this indictment, the remarks of the court, in the charge, upon the resemblance of the child, as tending to show its paternity, may not have been consistent with perfect accuracy of expression, yet,

HARMLESS ERROR—*Continued.*

taken in connection with what preceded and followed, did not constitute reversible error, as they were proper in order to guide the jury in correctly applying the proof. *S. v. Malonee*, 200.

2. *Negligence—Evidence—Harmless Error.*—As tending to show notice to the master of a negligent defect at a place where the servant was required to go in the discharge of his duties, plaintiff testified that he told the defendant's foreman thereof, and that the defendant's president said for the foreman to have it fixed; that in reply the foreman bowed his head: *Held*, it was not reversible error for the plaintiff to testify what he understood by the act of the foreman in bowing his head—that it made him think the hole would be fixed—it being germane to the question of plaintiff's contributory negligence in continuing to work in the presence of a known danger; or harmless error at least, the act necessarily indicating an assent. *Harvell v. Lumber Co.*, 254.

3. *Evidence—Irrelevant Questions—Harmless Error.*—During the examination of the plaintiff in this case an inquiry by the court, "You had a pretty big piazza, didn't you?" was held irrelevant and harmless, the action being to recover damages of the defendant railroad company for negligently setting fire to and destroying plaintiff's house by sparks from its locomotive. *Kornegay v. R. R.*, 389.

4. *Jurors — Questions Asked — Exhaust Challenges — Harmless Error.*—Questions asked the jurors by plaintiff in selecting them upon the trial, as to whether they were interested, etc., in defendant's indemnity company, held at least harmless error, as no juror was excused by reason of the questions asked and the defendant did not exhaust its peremptory challenges. *Norris v. Mills*, 474.

HAZARD. See Lottery, 2.

HIGHWAYS.

1. *Cities and Towns—Streets—Roads—Corporate Limits—Control.*—When a public highway enters an incorporated town, or such town builds up on one already existent, it usually follows that the highway, or so much thereof as is within the corporate limits, comes under the regulation and control of the corporate authorities as a part of the public streets. *Moore v. Meroney*, 158.

2. *Cities and Towns—Streets—Roads—Discontinuance—Legislative Powers—Compensation.*—In the absence of constitutional

HIGHWAYS—*Continued.*

restraint, the authorities of an incorporated town have power to vacate or discontinue a street or public way, but when such street has been once established they can do so only by legislative sanction expressly given or necessarily implied from powers which are so conferred, and then compensation must be made to abutting owners whose property is injured. *Ibid.*

3. *Cities and Towns—Streets—Roads—Obstructions—Changes—Abutting Owner—Damages.*—When a change is made in its streets, or the street is discontinued by the authorities of an incorporated town by legislative sanction, a landowner, as a rule, is restricted to a claim for the damages arising therefrom to him. *Ibid.*

4. *Cities and Towns—Streets—Roads—Changes—Legislative Authority — Taxpayer — Abutting Owner — Right of Action.*—When a change is made in a street by the authorities of an incorporated town, with or without legislative sanction, the change being recognized as valid, and acquiesced in by the general public, their action cannot be questioned in a civil suit of a private citizen by reason of his being a general taxpayer of the town; but, if maintainable at all, it can only be done by a landowner whose property is affected by the change, and who will suffer some peculiar and special injury by reason of it. *Ibid.*

5. *Cities and Towns — Streets — Roads—Dedication—Conduct—Ratification by Public.*—The incorporated town of M. altered the course of a portion of an old State road within its limits and substituted a broad, commodious street. At that time C. owned land on both sides of the old way, and was the only one whose property was affected. The property of C. abutted on the new street, and he made no objection, but by his fencing and other acts openly acquiesced in the change, inclosing the entire property, included the old way and used it as his own. A part of this property was sold and conveyed to plaintiff, who brings his action against the defendant, who bought the other part, to compel him to remove a house he had erected on the old road, and to compel the town to keep the old road open: *Held,* (1) the conduct of C. amounted to a dedication, and precludes plaintiff, who holds his title, and who purchased with knowledge of all the facts, from maintaining his action; (2) as to whether the public would be estopped from questioning the substitution of the new way for the old by a period of acquiescence, *quære. Ibid.*

HIGHWAYS—*Continued.*

6. *Cities and Towns— Streets—Roads—Deeds and Conveyances — Recitals — Boundaries — Rededication — Evidence.* — The plaintiff in his action seeks to compel defendant to remove as an obstruction a house he had erected in an old public road, within the corporate limits of the town, and the town to keep this road open. At this place the proper authorities of the town had changed the road to a new location, and the acts of plaintiff's grantor, binding upon plaintiff, amounted to a dedication of the new road in substitution of the old one. This new road, at the time, affected only the land of plaintiff's grantor, who was also the grantor to the defendant of the land whereon the obstruction complained of was situated: *Held*, the fact that plaintiff's deed calls for the old road as a boundary was merely a matter of description, being copied from some old deeds made when conditions were different, and did not amount to a rededication. *Ibid.*

7. *Cities and Towns—Streets—Roads—Dedication—Ratification —Limitation of Actions—Evidence.*—The principle that an abandonment of a public way cannot be presumed, if at all, from nonuse, for any period short of twenty years, has no application where there has been a positive act of dedication and abandonment on the part of the owner, accepted and acquiesced in by the public. *Ibid.*

HOMESTEAD.

1. *Homestead—Interest—Estates.*—A homestead in lands is not an estate therein, but a mere exemption right. *Davenport v. Fleming*, 291.

2. *Deeds and Conveyances—Creditors—Trustees—Homestead—Residue or Remainder.*—The general power of alienation incident to ordinary ownership of real property exists as to all the residue or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, Article X, section 8, of the Constitution applying alone to the homestead interest, and none other. *Ibid.*

3. *Deeds and Conveyances—Creditors—Trustee—Homestead Reserved—Purchaser—Estate Acquired.*—A valid deed in trust made by a debtor in favor of his creditors, reserving to himself his homestead in lands conveyed therein, passes to the grantee all his right, title, and interest in the lands conveyed, excepting his homestead interest expressly reserved; and when such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee. *Ibid.*

HOMESTEAD—*Continued.*

4. *Deeds and Conveyances—Trustees—Registration—Creditors—Subsequent Judgment—Homestead—Trespass—Injunction—Interpretation of Statutes.*—A debtor made a deed in trust for the benefit of his creditors, expressly reserving the homestead. The trustee in the deed after allotment sold the land to the wife of the debtor, in a transaction without suggestion of fraud or irregularity: *Held,* a judgment creditor whose judgment was obtained subsequent to the execution and registration of the trust deed acquired no interest in or lien upon the homestead, and could not enjoin the cutting of the timber, within the allotted homestead, by the husband, acting therein under the direction of his wife. Revisal, sec. 686, is, expressly, to have no retroactive effect, and is inapplicable to this case; but if otherwise, by construction, the result is the same. *Ibid.*

HOTELS. See Innkeepers.

HUSBAND AND WIFE.

1. *Deeds and Conveyances—Husband and Wife—Entireties—Survivorship.*—When land is conveyed to husband and wife jointly they take by entireties, and upon the death of one the whole belongs to the survivor. *Morton v. Lumber Co.*, 278.

2. *Same — Tenants in Common — Partition — Evidence.*— When lands are purchased by the husband, and under his instruction are conveyed to him and his wife, jointly, by deed of bargain and sale, with full covenants of warranty, the doctrine of survivorship is not affected by the fact that the lands so purchased were a part of lands conveyed by his father, W., to a guardian for the benefit of the children of W., there being no evidence upon the face of the deed to the husband that it was made in pursuance of a scheme to divide lands held in common among the children of W. *Harrington v. Rawls,* 131 N. C., 40; 136 N. C., 65, and *Sprinkle v. Spainhour,* 149 N. C., 224, cited and distinguished. *Ibid.*

3. *Deeds and Conveyances — Husband and Wife — Purchaser — Parol Trust.*—When a husband pays the purchase money for lands and has the conveyance thereof made to his wife, the law presumes that the lands are intended for a gift, or a provision made for her by him, and such facts alone are insufficient to impress the lands with a trust in his favor. *Ricks v. Wilson,* 282.

4. *Interpretation of Statutes—Common Law—Relevant Acts—Implication — Married Women — Separate Realty—Husband*

HUSBAND AND WIFE—*Continued.*

and Wife—Work Done.—At the time of the enactment of the statute making Revisal, sec. 2016, applicable to the property of married women, the common law declared that improvements placed on the lands of a married woman by her husband were intended for a gift; and Revisal, sec. 2107, provided that no contract between them "should be valid unless such contract was in writing and proved as required for conveyances at law, and unless it appeared to the officer taking her private examination that the contract was not unreasonable and not injurious to her, etc.: *Held*, the law does not repeal an older statute by implication, and that the statute giving a lien on the property of a married woman for work done on her land, amending section 2016, Revisal, does not include a lien on the wife's land filed by her husband for work done, etc.; and that the husband having no lien, his heirs can acquire none after his death. *Kearney v. Vann*, 311.

5. *Same—Contracts.*—The purpose of Revisal, sec. 2107, was to protect a married woman from the influence and control which the husband is presumed to have over her by reason of the marital relation, by an adjudication of the probate officer as to her interests; and the requirements imposed by this section are not dispensed with under the provisions of Revisal, sec. 2016, giving a lien on her lands for labor done, etc., when the lienor is her husband, though it is otherwise as to her written consent in dealing with a stranger, under Revisal, sec. 2094. *Ibid.*

6. *Married Women—Separate Realty—Husband and Wife—Work Done—Liens—Equity.*—Equity will not interfere to give a husband a lien on his wife's land for work done, etc., by reason of the consequent improved value of the wife's land. *Ibid.*

7. *Married Women—Separate Realty—Husband and Wife—Contracts Between—Notes.*—The fact that a wife executed a note to her husband for work, etc., done by him on her land, does not affect the question of a lien filed by the husband therefor, as the presumption is that the wife executed the note under the direction of the husband. *Ibid.*

IDENTITY. See Estoppel, 3.

ILLEGITIMATES. See Descent and Distribution, 1, 2, 3.

IMPRISONMENT. See Constitutional Law, 15, 16.

INDEPENDENT CONTRACTOR. See Contracts, 7, 8, 9, 10.

INDICTMENT. See Interpretation of Statutes, 8.

1. *Fertilizers — Public Benefit — Indictment—Evidence—Conviction.*—The defendant was tried for selling cotton-seed meal for fertilizer in violation of Revisal, 3597, under an indictment which followed the language of the statute, and the evidence showed that the defendant sold the meal in sacks upon which there were no tags or other indication of the weight of the sacks or the chemical composition of their contents, or other data respecting them, as required by the statute: *Held*, the indictment sufficient in form and the evidence fully justified a conviction; and the fact that the purchaser exchanged cotton seed for the meal was not material. *S. v. Oil Co.*, 635.

2. *Indictment—Common-law Misdemeanors—Superior Courts—Jurisdiction.*—When an indictment charges an offense indictable at common law it is within the exclusive jurisdiction of the Superior Court. *S. v. Faulk*, 638.

3. *Same—Statutory Offense—Justice of the Peace.*—An indictment charging that the defendant in certain public highways, in the presence of divers persons passing and repassing, "did curse in a loud voice and use profane language for the space of five minutes (reciting the profane words), with great disturbance and to the common nuisance of the good citizens of the State," states the offense of a common-law nuisance, and is within the jurisdiction of the Superior Court, notwithstanding he may have been indicted under a statute relating to a certain county whereunder conviction may have been had of a less offense, made a misdemeanor by the statute, cognizable before a justice of the peace in that county. *Ibid.*

4. *Same.*—An act relating to a certain county, making it "unlawful for any person to act in a disorderly manner by being drunk or using profane, obscene, or boisterous language on any public road" therein, does not oust the jurisdiction of the Superior Court of an indictment going further in its charges, and stating a common-law misdemeanor, though conviction may have been had under the statute. *Ibid.*

INEXPERIENCE. See Master and Servant, 18.

INFANTS. See Deeds and Conveyances, 28.

INHERITANCE. See Descent and Distribution, 1, 3.

INJUNCTION.

1. *Cities and Towns—Paving Streets—Prerequisites—Jurisdictional—Order—Appeal—Injunction—Equity.*—When, under a

INJUNCTION—*Continued.*

statutory authority given a city to pave its streets, it is among other things required that a petition be filed by the owners of a majority of the front feet abutting thereon and notice be given, etc., prior to an order made by the aldermen, and it appearing that the order had been made upon petition after giving the notice required by the statute, and in other respects in pursuance of the act, and no objection entered or appeal from the order as provided for: *Held*, after the expiration of five years an order restraining sale of plaintiff's property to pay for the paving will not be granted to two of the abutting owners on the street, upon the ground that a majority, as provided, of the abutting owners had not in fact signed the petition; (1) the assessment and levy, as made, had the effect of a judgment and lien; (2) though the petition was a prerequisite, it was not jurisdictional, and the order, in effect, was a finding that the petition was true, and, not appealed from, was conclusive; (3) the statutory notice made the plaintiffs parties to the proceedings; (4) the granting of a restraining order after five years would be inequitable to the other taxpayers and property-owners of the town. *Schank v. Asheville*, 40.

2. *Cities and Towns—Ordinance—Nuisance—Alleyway—Access to Property—Procedure.*—The defendant town, by an ordinance criminal in its nature, declared plaintiff's alleyway a nuisance and dangerous to the public, and closed it up. Plaintiff brings his action for damages and mandamus and injunction, on the ground that he had been deprived of access to his property: *Held*, the action was not to enjoin the enforcement of the criminal law, but to determine and enforce plaintiff's property rights, leaving open to the defendant the right to prosecute him under the ordinance. *Crawford v. Marion*, 73.

3. *Cities and Towns—Streets—Adjoining Owner—Access—Injunction—Damages—Procedure.*—The right of ingress and egress over one's own land to and from a public street is an incident to ownership and constitutes a property right; and an injunction will lie against a town to prevent its depriving an abutting owner to a street of access to his land, and may be joined in the same action with demand for damages. *Ibid.*

4. *Cities and Towns—Streets—Adjoining Owner—Access—Procedure.*—It appears in this case that the plaintiff has been provided with a temporary entrance to his land, and a temporary order restraining the defendant from closing the one

INJUNCTION—*Continued.*

complained of is unnecessary and will not be granted. If it should be finally determined that the alleyway, the subject of the action, is dangerous to the public, or a nuisance, the court will consider the best means of abating or remedying it. *Ibid.*

5. *Deeds and Conveyances—Trustees—Registration—Creditors—Subsequent Judgment—Homestead—Trespass—Injunction—Interpretation of Statutes.*—A debtor made a deed in trust for the benefit of his creditors, expressly reserving the homestead. The trustee in the deed after allotment sold the land to the wife of the debtor, in a transaction without suggestion of fraud or irregularity: *Held,* a judgment creditor whose judgment was obtained subsequent to the execution and registration of the trust deed acquired no interest in or lien upon the homestead, and could not enjoin the cutting of the timber, within the allotted homestead, by the husband, acting therein under the direction of his wife. Revisal, sec. 686, is, expressly, to have no retroactive effect, and is inapplicable to this case; but if otherwise, by construction, the result is the same. *Davenport v. Fleming,* 291.

6. *Waste—Injunction—Principal Remedy—Irreparable Injury—Practice.*—In an action to restrain waste, the principal relief sought is that by injunction, and in such a case, where it appears to the court by conflicting affidavits that irreparable injury may follow a refusal to do so, the injunction should be continued to the hearing. *Person v. Person,* 453.

7. *Counties — Taxation—Conflicting Demands—Injunction—Parties—Misjoinder—Removal of Causes—Discretion of Court—Procedure.*—This action involves a controversy between two counties as to which is entitled to assess taxes upon the same personal property, consisting of solvent credits. The sheriff of one county seized the property in the hands of an administrator as that of a deceased resident, and the sheriff of the other claims it as that of one of its citizens to whom the deceased is alleged to have duly assigned it before June 1. The administrator of deceased and the alleged assignee seek to enjoin the sheriffs of both counties from selling the property for taxes, offering to pay into court the taxes on the larger amount assessed: *Held,* (1) the main relief is that by injunction, and the injunction should be continued; (2) the pleadings relate to one transaction, and there is no misjoinder of parties; (3) the plaintiffs could elect to sue in either county; (4) the question of the re-

INJUNCTION—*Continued.*

moval of the action in effect involved the contest of the two counties over a fund and within the discretion of the trial judge; (5) the right of either county to the tax depended upon the place of residence of the true owner, a question of fact for the jury under conflicting evidence; (6) the plaintiffs should not be required to pay the tax and sue the respective counties to recover it back; (7) the remedy by injunction is the proper one. Revisal, secs. 821, 2855. *Sherrod v. Dawson*, 525.

8. *Injunction—Damages—Cause of Action—Judgment.*—Defendant was restrained from selling plaintiff's land upon plaintiff's application, and *ex mero motu*, as a precaution, the judge restrained plaintiffs from cutting and removing timber. Plaintiffs moved for damages caused by the order restraining them, and it was *Held*, that a judgment upon defendant's motion to dismiss was properly granted, as the damages sought were not recoverable. *Kerr v. Hicks*, 608.

INNKEEPERS.

1. *Public Inns—Hotels—Guests—Invitation—Negligence.*—A hotel keeper, from the nature of his occupation, extends an invitation to all who come on his premises; and though not an insurer of the guest's personal safety, he is responsible in damages for injuries received by the guest from being placed in an unsafe or unsanitary room. *Patrick v. Springs*, 270.

2. *Same — Contributory Negligence — Evidence — Questions for Jury.*—In this case there was evidence tending to show that the plaintiff, a guest at defendant's hotel, was shown into a bedroom wherein there was a defective gas fixture by which a light was furnished to the occupant, by reason of not having a safety-pin to prevent the turning of the key all the way around, and that the gas fixture was not safe in consequence; that before retiring for the night the plaintiff discovered the absence of this safety-pin, but turned the key to where it should have stopped, and could smell no gas escaping, and thereupon he retired, but was injured by asphyxiation that night when asleep: *Held*, a motion to nonsuit was properly denied, there being evidence of defendant's negligence; and it was for the jury to say whether, according to the rule of the prudent man, the plaintiff was guilty of such contributory negligence as would bar his recovery. *Ibid.*

INQUIRY. See Bankruptcy, 5, 8.

INSOLVENCY. See Corporations, 7, 8, 9, 10, 11.

INSTRUCT. See Master and Servant, 6, 10, 24, 25.

INSTRUCTIONS. See Assumption of Risks, 2.

1. *Instructions, Form of—Specific Issues.*—When an action is tried upon specific issues framed to ascertain the facts involved, a prayer for a special instruction that "if the jury believe the evidence, the plaintiff is entitled to recover," may be disregarded. *Jones v. Balsley*, 63.

2. *Deeds and Conveyances—Damages—Notice—Attorneys' Fees—Instructions.*—In an action against the covenantor, an instruction that the covenantee may recover attorneys' fees paid by him in defending an action brought to recover the land embraced in his deed and warranty, leaves out of consideration the reasonableness of the fees, and is reversible error; and when the costs and attorneys' fees are blended by the jury in one sum in the answer to the issue, a new trial will be awarded thereon. *Ibid.*

3. *Instructions—Nonsuit—Evidence, How Considered.*—Asking a special instruction that "upon all the evidence, if believed, the plaintiff was guilty of contributory negligence as a matter of law, and the jury will answer" the issue in defendant's favor, is equivalent to asking the direction of a nonsuit, and the evidence will be viewed on appeal in the light most favorable for the plaintiff. *Lane v. R. R.*, 91.

4. *Contracts—Acceptance—"Final Estimate" of Work—Fraud in Law—Intent—Instructions—Right of Action.*—The plaintiff was a subcontractor of defendant, which was in turn a subcontractor of M. & Co., to build a railroad, the contract between M. & Co. and the original contractor, which was binding upon plaintiff, providing that the latter's engineer should certify that the work had been performed and accepted by the engineer. It was set up as a defense that the plaintiff could not maintain his action until the certificate had been obtained. It was found by the jury, in response to appropriate issues, that a "final estimate" had been rendered the plaintiff by M. & Co., but was grossly inadequate: *Held*, (1) not error for the court to instruct the jury that if the estimate referred to contained such error of judgment as amounted to a mistake so gross as to necessarily imply bad faith, and to amount to fraud upon the rights of plaintiff, it was unnecessary to show the intention to commit a fraud or to act in bad faith, the court having correctly charged as to what constitutes legal fraud; (2) the jury having found

INSTRUCTIONS—*Continued.*

that plaintiff had legal excuse to bring his action, a judgment in his favor will not be disturbed. *McDonald v. MacArthur*, 122.

5. *Murder—Manslaughter—Act of Necessity—Self-defense—Instructions—Presumptions.*—Upon trial on an indictment for murder the judge charged the jury that unless the defendant "has further satisfied you that he killed him (deceased) from necessity or from a principle of self-defense, your verdict must be guilty of manslaughter": *Held*, not reversible error, defendant having failed to send up the charge of the court, and the presumption being that he correctly charged upon the law of self-defense. *S. v. Simonds*, 197.

6. *Marriage — Seduction — Breach of Promise — Instructions — Harmless Error.*—In the trial of this indictment, the remarks of the court, in the charge, upon the resemblance of the child, as tending to show its paternity, may not have been consistent with perfect accuracy of expression, yet, taken in connection with what preceded and followed, did not constitute reversible error, as they were proper in order to guide the jury in correctly applying the proof. *S. v. Malonee*, 200.

7. *Marriage — Seduction — Breach of Promise — Instructions — Weight of Evidence—Questions for Jury.*—The remarks of the judge to the jury upon the flight of the defendant from the State after indictment did not constitute reversible error when considered in connection with all the evidence, as the jury should pass upon the whole evidence and decide what weight should be given the fact of flight, and to what extent the explanatory evidence affected the probative force of the flight as a fact tending to show guilt. *Ibid.*

8. *Instructions, Detached Portions—Record—Appeal and Error.*—The incorrectness of a charge may not be determined on appeal from one or two detached portions excepted to, and when the entire charge is not set forth in the record, it will be assumed that it correctly stated the law of the case to the jury, in the absence of any showing to the contrary. *Ibid.*

9. *Trusts and Trustees—Parol Trusts—Evidence—Instructions—Questions for Jury.*—Where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for them to say whether it is "clear, strong, cogent, and convincing." *Taylor v. Wahab*, 210.

10. *Appeal and Error—Instructions—Entire Record—New Trial—Procedure.*—When the charge of the trial court is erroneous

INSTRUCTIONS—*Continued.*

in respect to that part excepted to by the defendant, and the entire evidence relative to the inquiry is before the court, from which it is perfectly apparent that in no aspect of it is there any defense available, a new trial will not be granted. *Bateman v. Lumber Co.*, 248.

11. *Instructions, How Construed—Correct as a Whole.*—The charge of the court to the jury must be considered as a whole and not disconnectedly, and each instruction must be construed with reference to what preceded and followed it; and when the charge as thus viewed is correct, detached portions thereof, even in themselves subject to criticism, do not constitute reversible error. *Kornegay v. R. R.*, 389.

12. *Master and Servant—Defective Machine—Contributory Negligence—Evidence—Instructions.*—In an action by an employee to recover damages of his employer for a personal injury received in operating a planing machine in defendant's mill, there was evidence tending to show that the machine had revolving cogs operated by steam power, which were left unboxed and exposed, and that a feed gear or shift by which the power was applied and shut off was defective, all of which had been called to defendant's attention. The plaintiff admitted the necessity of shutting off the power before attempting to relieve a choked condition of the machine, and there was contradictory evidence as to whether he waited, after shutting off the power, until the wheels stopped revolving, before attempting to clear the machine, wherein the injury was inflicted: *Held*, the conflict of evidence presented an issue of fact to the jury, and it was error to refuse to instruct the jury that plaintiff was guilty of contributory negligence, should they find that he placed his hand in the machine before the cogs stopped revolving, after he had shut off the motive power, and was thereby injured. *Bryan v. Lumber Co.*, 485.

13. *Railroads—Crossings—Negligence—Rule of the Prudent Man—Instructions.*—The plaintiff, employed by defendant to warn those desiring to cross its many tracks at a public crossing of any danger which might exist, was injured by a passing locomotive while endeavoring to discharge his duties under circumstances which rendered the issue of contributory negligence a proper one for the jury, and it is held that this case is governed by the "rule of the prudent man," and that the trial judge properly instructed the jury that it was plaintiff's duty to exercise all reasonable vigilance by looking as well as listening for approaching trains as the circumstances

INSTRUCTIONS—*Continued.*

and his occupation and duty to the traveler permitted; and that if he failed to do so, it was such contributory negligence as barred his recovery. *Wolfe v. R. R.*, 569.

14. *Street Railways—Alighting Passengers—Negligence—Questions for Jury—Instructions.*—In an action for damages against a street car company for negligence alleged in suddenly starting the car while plaintiff, a woman of 58 years, seeming to the conductor to be "old and clumsy," was alighting at her destination, of which she had previously notified the conductor, from an ordinary summer car with seats running across and handholds at either end of the seats, the distance from the floor of the car to the running-board being 17 inches and from that to the ground 25 inches, the ground sloping at the place somewhat over 9 inches, an instruction is proper, that if the jury should find, under supporting and conflicting evidence, that if the car was suddenly started and jerked as the plaintiff was alighting with one foot on the running-board and the other in the act of descending to the ground, whereby the plaintiff was thrown to the ground, they should answer the issue of negligence "Yes," but otherwise if the plaintiff fell on the sloping ground after leaving the car. *Morarity v. Traction Co.*, 586.

15. *Negligence—Evidence—Instructions.*—In this action for damages for personal injuries the usual and appropriate issues of negligence, contributory negligence, and the last clear chance were submitted under evidence tending to show that plaintiff, while walking on defendant's track, became unconscious, and was injured by defendant's train under circumstances in which the engineer could have seen his condition in time to have avoided the injury, and it was held that the instructions given by the court were not erroneous, under *Sawyer's case*, 145 N. C., 24, and other like cases. *Guilford v. R. R.*, 607.

16. *Court Sittings—Proceedings—Notice—Instructions—Absence of Attorneys—Discretion of Court.*—Whether it is the duty of a judge of the Superior Court to send for counsel in a case while considering it, at a regular sitting in term, for the "unusual reason" required by Rule 27 of the Supreme Court, is a matter within the discretion of the trial judge, and will not be considered on appeal. *S. v. Denton*, 641.

17. *Same.*—When a case has been given to the jury, and the jury requests the trial judge to instruct them upon the law as to certain of its phases, it is not error for the court to comply

INSTRUCTIONS—*Continued.*

with the request of the jury, in the absence of counsel, when done at a regular sitting of the court in term. *Ibid.*

18. *Spirituous Liquors—Unlawful Sale—Abettors—Evidence—Instructions.*—Upon trial for violating the general prohibition law in the sale of whiskey, a charge upon supporting evidence was held correct in substance as follows: That if the jury should be satisfied from the evidence that H. owned the whiskey and brought it in a basket to defendant's home for the purpose of selling it there, and sold a pint to one D. in defendant's presence and with his knowledge, the defendant would be guilty of aiding and abetting the sale; and that as in misdemeanors all aiders and abettors are principals, the defendant would be guilty as a principal in the unlawful sale. *Ibid.*

INSURABLE INTEREST. See Insurance, 3, 6.

INSURANCE.

1. *Insurance Orders—Restrictive Rights—Tribunals—Courts.*—A member of an insurance order is not bound by any agreement or stipulation restricting his rights to recover sick benefits to the determination of the tribunals of the order, and may enforce them in the courts without first resorting to the tribunals thereof. *Kelly v. Trimont Lodge*, 97.

2. *Insurance Orders—Sick Benefits—Personal Rights—Restrictive Liability—Beneficiaries—Executors and Administrators.*—The member of an insurance order becomes entitled, as a matter of right, to the sick benefits accruing to him under his policy of insurance, and upon his death without having received payment thereof the cause of action against the order survives and is enforcible under Revisal, sec. 415; and when the constitution of the order provides that the "benefits are rights personal to the member, his family and dependent relatives, and are not payable to the legal representatives of a member's estate," the personal representative of the deceased member may maintain his action against the order to recover the benefits, when there are none who belong to the named classes to take; and the amount recovered will go into the intestate's estate for distribution or disbursement as required by the statute. *Ibid.*

3. *Insurance — Policies — Assignment—Insurable Interest—Good Faith—Affection—Knowledge—Evidence.*—When in an action to recover upon a life insurance policy by an assignee thereof there are appropriate issues as to the good faith of the assignee or beneficiary in paying the premiums, and

INSURANCE—*Continued.*

whether the interest of the assignee was an insurable one, evidence is competent, upon the question of good faith in the assignments, which tends to show the affectionate relationship between him and the insured, that the insured regarded him as a son, and that he knew nothing of the transaction before the policy and its assignment to him were brought to him by the agent of the company. *Hardy v. Insurance Co.*, 430.

4. *Insurance—Policies—Interpretation—Assignment—"First Payment"—Waiver.*—A provision in a life insurance policy payable to the estate of the insured, that it shall not be in force until the first premium is paid by the insured, is waived when the agent of the company is aware of all the facts, and upon information given by him to the State agent and the company itself, the latter sent the policies and forms for an assignment to the local agent for the purpose of having the contract completed, and received from the assignee, the beneficiary, the premiums for four years; and it thus appearing that the beneficiary paid the first premium without previous knowledge of the transaction, the first payment made by him was a valid one. *Ibid.*

5. *Same—Valid Inception.*—When a life insurance policy is delivered to the insured, but was assigned to the beneficiary, and the first payment of premiums was made by the beneficiary under circumstances rendering the payment a valid one, though against a stipulation in the policy that it must be paid by the insured to be binding on the company, it renders the policy valid in its inception. *Ibid.*

6. *Insurance — Policies—Insurable Interest—Assignment—Validity—Wagering Policies.*—A policy of life insurance valid in its inception may be assigned to one not having an insurable interest in the life of the insured, when done in good faith, and not as a mere cloak or cover for a wagering transaction. *Hardy v. Ins. Co.*, 152 N. C., 286, cited and approved. *Ibid.*

7. *Insurance—Policies—Delivery—Intent.*—A delivery of a policy of life insurance may be shown by the intent of the parties, and its physical delivery is not necessary. *Ibid.*

8. *Insurance—Policies—Assignment—Waiver—Payment of Premiums — Wagering Policy — Knowledge — Evidence — Valid Contract.*—The agent of the defendant insurance company solicited and procured from insured applications for several policies of insurance, with the agreement that his children should pay the premiums thereon. When the policies were

INSURANCE—*Continued.*

delivered to insured it was found that one of the children would not pay the premiums on one of them, and the insured told the agent he wished plaintiff to have the policy. The agent said that the plaintiff did not have an insurable interest, but for insured to take the policy, have it payable to his estate, and assign it to plaintiff, which was done accordingly, with knowledge thereof given to the defendant company, which sent the policies and assignment blanks to the agent, who had them executed and delivered them to the plaintiff, theretofore unaware of the transactions, and he continued to pay the premiums to the company for four years: *Held*, it was too late for the company to object to the validity of the assignment and the payment of the premiums by the plaintiff, after the maturity of the policy. *Ibid.*

9. *Insurance, Fire—Cancellation—Substitution—Mortgagor and Mortgagee—"Loss Payable" Clause—Estoppel—Equity.*—The defendants, three fire insurance companies, issued several policies on a mortgaged premises with the usual loss clause, payable to the mortgagee. One of them solicited, through its agent, a policy in substitution of the three policies, and issued a policy accordingly, claiming through its general agent the premiums therefor. In this policy there was no clause with loss payable to the mortgagee, and it appears that he was not aware of the change of policies until after the property was destroyed by fire and the insurance due. The other companies were notified, and canceled their policies, sending them to the mortgagor, requesting a return of the canceled policies, which were not returned because of their being in possession of mortgagee. In an action by the mortgagor and mortgagee against the three companies to recover the insurance due by the loss by fire of the premises: *Held*, (1) the insurance company issuing the substituted policy and the mortgagor are estopped by their conduct to deny the cancellation of the three original policies and the substitution of the later one in lieu thereof; (2) the release of the three original policies was only binding between the parties to the agreement, and not upon the mortgagee; (3) the mortgagee is entitled to judgment for one-third part of his debt against each of the three original policies, to be canceled upon payment of his loss out of the substituted policy. *Lee v. Insurance Co.*, 446.

INTENT. See Contracts, 15; Deeds and Conveyances, 31, 41, 45; Fraud, 1, 3; Insurance, 7; Interpretation of Statutes, 17, 18, 19, 20, 24; Penalty Statutes, 2, 4; Usury, 7.

INTEREST. See Descent and Distribution, 5, 6.

INTERPRETATION OF STATUTES. See Statutes; Penalty Statutes; Cities and Towns, 20.

1. *Appeal and Error—Courts—Expression of Opinion—Interpretation of Statutes.*—In this case the judge in charging the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff bases the eleven thousand and some odd dollars": *Held*, this was not an expression of opinion prohibited by Revisal, 535, it not appearing that the expressions used were pertinent to the issue, or were prejudicial to appellant, or corroborative of an alleged error based upon his admitted ignorance, or failure to comprehend plaintiff's claim upon which the law was incorrectly charged. *McDonald v. MacArthur*, 11.

2. *Deeds and Conveyances—Seal—Corporate Act—Evidence—Interpretation of Statutes.*—When it does not appear from the probate of a corporation's deed to lands that the seal affixed is the common seal of the corporation or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with Revisal, sec. 1005, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. *Withrell v. Murphy*, 82.

3. *Same—Official Acts.*—A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. *Ibid.*

4. *Corporations—Receivers—Status of Property—Interpretation of Statutes.*—Upon the appointment of a receiver of an insolvent corporation, all the real and personal property, etc., wherever situated, vests in the receiver (Revisal, sec. 1224), "impressed with all existing rights and equities, and the relative rank of claims and standing of liens remains unaffected by the receivership." *Ibid.*

5. *Clerk of Court—Fees—Cost—Interpretation of Statutes.*—The fees for continuances of cases allowed to the clerk of the Superior Court by Revisal, sec. 2773, must be for such continuance as is made by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial. *Luther v. R. R.*, 103.

INTERPRETATION OF STATUTES—*Continued.*

6. *Habeas Corpus—Certiorari—Supreme Court—Review—Record—Final Judgment—Evidence—Interpretation of Statutes.*—In *habeas corpus* proceedings, where it appears from the application for *certiorari* in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court; and when such fact is disclosed on the hearing, the petition must be remanded. Revisal, sec. 1822 (2), 1827, 1848 (2). *In re Holley,* 164.

7. *Habeas Corpus — Certiorari — Supreme Court — "Competent Jurisdiction"—Definition—Words and Phrases—Interpretation of Statutes—Constitutional Law.*—The term, "competent jurisdiction," used by the Revisal, sec. 1822, in making an exception to the power of this Court to review a judgment in *habeas corpus* proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional. *Ibid.*

8. *Habeas Corpus—Supreme Court—Certiorari—Jurisdiction—Value of Goods Stolen—Sentence—Burden of Proof—Indictment—"Aggravation"—"Hardened Offender"—Interpretation of Statutes.*—It appeared in the record in this case that defendant, suing out a *certiorari* in the Supreme Court in *habeas corpus* proceedings, was sentenced for a term of five years, of which he has served eighteen months; that he had been indicted for stealing goods to the value of $10; that theretofore he had, on separate occasions, been convicted for shooting a man, for retailing, and for larceny, in all of which judgment was suspended, but all of them had gone off the docket; that in the present proceedings the judgment cited the former convictions and that it had been made to appear that the stolen goods were worth between $250 and $300. It was contended by petitioner that under our statutes, Revisal, secs. 3500, 3506, a sentence for more than one year is illegal: *Held,* (1) the amount alleged in the bill of indictment (here $10) is not conclusive on the question of punishment; (2) the amount or value of the stolen property is not now an essential ingredient of the crime of larceny, and it is only a matter of amelioration of the punishment, to be raised and determined at the instance of defendant as an issue of fact on the trial; and therefore there is no indication on this record and judgment that the sentence was not

INTERPRETATION OF STATUTES—*Continued.*

within the power of the court that imposed it; (3) that the record and judgment showed a case "of much aggravation or of hardened offenders," where, in the discretion of the court, a sentence not exceeding ten years may be imposed. *Ibid.*

9. *Larceny, Petty—Punishment—Interpretation of Statutes.*—At common law petty larceny was regarded as an infamous offense and subject to corporal punishment; and except as modified by Revisal, secs. 3500, 3506, the punishment would, in all cases, be imprisonment for not less than four months nor more than ten years. Revisal, secs. 3292, 3293. *Ibid.*

10. *Marriage—Seduction—Breach of Promise—Testimony of Prosecutrix—Supporting Evidence—Interpretation of Statutes.*—The testimony of the prosecutrix, on the trial of an indictment for seduction under a promise of marriage, as to the promise, seduction, and her innocence and virtue, supported by the fact that a child was afterwards born to her, and other evidence tending to show that prior to her alleged seduction she had always been of good character, had led a blameless life, and as a schoolgirl had borne a good reputation with her teacher and schoolmates, together with the admission of the defendant that he promised to marry her before the seduction, is supporting evidence under the statute providing that the unsupported testimony of the woman shall not be sufficient to convict. Revisal, sec. 3354. *S. v. Malonee*, 200.

11. *Railroads — Fellow-servant Act — Scope — Interpretation of Statutes.*—While the provisions of the Fellow-servant Act, Revisal, sec. 2646, do not extend to a railroad in process of construction before it is operated as a railroad, it does apply, when the railroads are in operation, to their employees in the course of any department of the work embraced in or incidental to the operation of the road. *Twiddy v. Lumber Co.*, 236.

12. *Estates — Illegitimates — Inheritance—Interpretation of Statutes.*—Revisal, sec. 1556, Rules 9 and 10, does not restrict the principle that "all illegitimates" have the same right of inheritance as between themselves "as if legitimate," but broadly reiterates the doctrine in the most unambiguous terms. *Ashe v. Mfg. Co.*, 241.

13. *Same—"Half Blood"—Mother.*—There is no half blood between illegitimates, and they take by descent only through their mother. The statute regulates the descent of the realty of illegitimates who die intestate, without reference to the father. Revisal, sec. 1556. *Ibid.*

INTERPRETATION OF STATUTES—*Continued.*

14. *Estates — Illegitimates—Inheritance—Prohibited Marriages—Races—Constitutional Law—Interpretation of Statutes.*—The constitutional prohibition (Art. XIV, sec. 6) of marriages between the races does not affect an illegitimate brother's inheriting the estate of an intestate whose father was a negro and mother a white woman; and the fact that the intestate could not be treated "as if born in lawful wedlock," Revisal, sec. 1556, Rules 9 and 10, has no application. *Ibid.*

15. *Same—Suppress Competition—Conspiracy—Notary Public—Interpretation of Statutes.*—One who makes a sealed bid required for the contract of carrying the United States mails cannot sustain an action for damages against the notary public before whom the bond was justified, in accordance with the Federal statute, upon the ground that he requested the notary not to divulge the amount of his bid, and the notary, knowing the amount, underbid him and obtained the contract. (1) There has been no violation of a legal duty alleged or shown; (2) had the notary promised not to compete with plaintiff in the biddings, it would, as an agreement to suppress competition, have been against public policy, the notary being qualified to bid under the circumstances; (3) the fact that defendant acted as a notary in his official capacity would not make him liable upon the breach of promise, if one was implied, to do an unlawful act; (4) a promise of the kind sued on is expressly condemned by the Federal act in question. *Hardison v. Reel,* 273.

16. *Deeds and Conveyances—Trustees—Registration—Creditors—Subsequent Judgment—Homestead—Trespass—Injunction—Interpretation of Statutes.*—A debtor made a deed in trust for the benefit of his creditors, expressly reserving the homestead. The trustee in the deed after allotment sold the land to the wife of the debtor, in a transaction without suggestion of fraud or irregularity: *Held,* a judgment creditor whose judgment was obtained subsequent to the execution and registration of the trust deed acquired no interest in or lien upon the homestead, and could not enjoin the cutting of the timber, within the allotted homestead, by the husband, acting therein under the direction of his wife. Revisal, sec. 686, is, expressly, to have no retroactive effect, and is inapplicable to this case; but if otherwise, by construction, the result is the same. *Davenport v. Fleming,* 291.

INTERPRETATION OF STATUTES—*Continued.*

17. *Interpretation of Statutes—Intent.*—Statutes should be interpreted to effect the intent of the Legislature, and enforced without reference to particular cases presenting a hardship. *Kearney v. Vann*, 311.

18. *Same—Words Employed.*—In interpreting a statute the intent is to be first sought in the meaning of the words used, and when they are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instruments, no other means of interpretation should be resorted to. *Ibid.*

19. *Interpretation of Statutes — Intent — Common Law—Relative Acts.*—Statutes are to be construed with reference to the common law in existence at the time of their enactment, and in connection with other statutes which relate to the same subject-matter. *Ibid.*

20. *Interpretation of Statutes—Intent—Object—Defects—Evil—Remedy.*—Every statute must be construed with reference to the object to be accomplished by it; and in order to ascertain this object, it is proper to consider the occasion for its enactment, the effects or evils of the former law, and the remedy provided by the new one. *Ibid.*

21. *Interpretation of Statutes—Common Law—Relevant Acts—Implication — Married Women—Separate Realty—Husband and Wife—Work Done.*—At the time of the enactment of the statute making Revisal, sec. 2016, applicable to the property of married women, the common law declared that improvements placed on the lands of a married woman by her husband were intended for a gift; and Revisal, sec. 2107, provided that no contract between them "should be valid unless such contract was in writing and proved as required for conveyances at law, and unless it appeared to the officer taking her private examination that the contract was not unreasonable and not injurious to her, etc.: *Held*, the law does not repeal an older statute by implication, and that the statute giving a lien on the property of a married woman for work done on her land, amending section 2016, Revisal, does not include a lien on the wife's land filed by her husband for work done, etc.; and that the husband having no lien, his heirs can acquire none after his death. *Ibid.*

22. *Same—Contracts.*—The purpose of Revisal, sec. 2107, was to protect a married woman from the influence and control which the husband is presumed to have over her by reason

INTERPRETATION OF STATUTES—*Continued.*

of the marital relation, by an adjudication of the probate officer as to her interests; and the requirements imposed by this section are not dispensed with under the provisions of Revisal, sec. 2016, giving a lien on her lands for labor done, etc., when the lienor is her husband, though it is otherwise as to her written consent in dealing with a stranger, under Revisal, sec. 2094. *Ibid.*

23. *Cities and Towns — Streets — Easements — Value — Abutting Owners—Reversion—Contracts—Interpretation of Statutes.*— The plaintiff, a railroad, and a terminal company, desirous of connecting their property, entered into an agreement with a city that it should agree to the procurement of a legislative act authorizing the condemnation of a street to effectuate that purpose, the former corporations agreeing to pay the city for the easement and to build certain improvements on their adjoining lands; the act passed according to this agreement, providing that under certain named conditions the street should revert to the city for public purposes. The plaintiff denied the right of the city to compensation for the easement over the street, upon the ground that, as abutting owners, they held the fee therein: *Held,* (1) a city holds the easement in its streets in trust for all its citizens, and was entitled to compensation from the plaintiffs; (2) here it was entitled to compensation under an express agreement relative to the passage of the act; (3) the act itself recognized the value of the easement in the street to the city, and provided for the reversion under named conditions. *R. R. v. Wilmington,* 331.

24. *Counties — Boundaries — Location—Intent—Interpretation of Statutes—Contracts—Constitutional Law.*—A legislative act reciting that a boundary line between two counties is "indefinite and uncertain," declaring its purpose to establish the line and proceeding then to define and describe the line, clearly indicates the intent to declare and establish what it deems the true boundary line; and the line so established must be taken as the true line without question of its historical correctness; and the questions of private rights and impairments of contracts are not involved. *R. R. v. Washington,* 333.

25. *Legislative Acts — Courts — Interpretation — Constitutional Law.*—Courts will not adjudge an act of the Legislature invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable. *Bonitz v. School Trustees,* 375.

INTERPRETATION OF STATUTES—*Continued.*

26. *Same.*—Between two permissible interpretations of a statute with reference to the Constitution, the one should always be adopted which upholds the law. *Ibid.*

27. *Cost—Recovery—Several Causes of Action—Interpretation of Statutes.*—The matter of taxing costs against an unsuccessful litigant is regulated by statute, and thereunder the full cost should be taxed against a defendant when the plaintiff recovers in but one of several causes of action set out in his complaint. Revisal, sec. 1249. *Cotton Mills v. Hosiery Mills,* 462.

28. *Promise to Work—Peonage—Interpretation of Statutes—Constitutional Law.*—A statute which makes the mere failure to do the work or perform the contract presumptive evidence of fraudulent intent, upon which a person may be convicted and imprisoned, is violative of the Thirteenth Amendment to the Federal Constitution, and is in conflict with our own State Constitution prohibiting imprisonment for debt except in case of fraud. *S. v. Griffin,* 611.

29. *Jurors — Cause Pending — Disqualification—Interpretation of Statutes.*—The reason why those having causes pending and at issue are disqualified to serve as jurors is that they should not, under the circumstances, be permitted to serve in close relationship to other jurors who may be called upon to try their cases, and this disqualification does not apply when the cause is pending and at issue, but not to be tried at that particular term of the court. *S. v. Hopkins,* 622.

30. *Cities and Towns—Fire Department—Building and Repairing—Permit—Interpretation of Statutes.*—The chief of a fire department, who is also the inspector, in incorporated towns of one thousand inhabitants or more, is authorized to issue a permit to the owner of property to build or to repair buildings thereon. Revisal, secs. 2986, 3010. *S. v. Eubanks,* 628.

31. *Same—Ordinance—Conflicting Requirements.*—When an owner of property in an incorporated town of one thousand or more inhabitants has obtained from the chief of the fire department, or inspector, of that town a permit to repair a building on his property, in accordance with the provisions of Revisal, 2986, 3010, he is not subject to indictment for violating an ordinance of the town in not first getting a permit to repair from the board of aldermen of the town; for the town cannot by ordinance make an act illegal which is legal under our statutes. *Quœre:* If there is no conflict between the ordinance and the statute, does *S. v. Tenant,* 110 N. C., 609, apply? *Ibid.*

INTESTACY. See Wills, 7.

INTOXICATING LIQUORS. See Spirituous Liquors.

INVITATION. See Innkeepers, 1.

ISSUES.

1. *Deeds and Conveyances—Warranty—Locus in Quo—Location—Issues.*—In an action for damages for breach of warranty in a deed for lands, when it is alleged in the complaint that judgment had been recovered by a third person for a part of the lands upon a title paramount, which is not denied, but the answer alleges that the lands were not embraced in the deed containing the warranty sued on, the issue raised is as to the true location of the land, and does not embrace the paramountcy of the title. *Jones v. Balsley*, 61.

2. *Same Judgment—Estoppel of Record.*—In an action for damages for breach of warranty in a deed for lands, there was evidence tending to show that in a suit regularly instituted and tried, one W. and others had recovered from plaintiffs a part of the land covered by defendants' warranty. In the former suit nothing appeared to indicate that the location of the land was involved, and in the present suit the issue was whether the *locus in quo* was embraced by the deed and warranty: *Held*, the plaintiff was not estopped by the record in the original suit to show the true location of the land and that the title was protected by the warranty, and, further, to allege and prove damages in his action upon the covenant, it having been only necessary for the plaintiff in the former suit to show paramountcy of title. *Ibid.*

3. *Instructions, Form of—Specific Issues.*—When an action is tried upon specific issues framed to ascertain the facts involved, a prayer for a special instruction that "if the jury believe the evidence, the plaintiff is entitled to recover," may be disregarded. *Ibid.*

4. *Reference—Exceptions—Issues.*—The judge is not precluded by the issues formulated by the party excepting to a reference; he should submit the issues properly raised by the pleadings. *Rogers v. Lumber Co.*, 108.

5. *Issues, Form of.*—It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on its merits. *Wilson v. Taylor*, 211.

ISSUES—*Continued.*

6. *Same.*—In this action brought by the trustee in bankruptcy to recover of a creditor the amount of an alleged preference under the Bankrupt Act, it was *Held*, that an issue, "Is the defendant indebted to the plaintiff, and, if so, in what sum?" was preferable to separate issues as to the various elements necessary under the Bankrupt Act to constitute a preference; and it appearing that the case was correctly tried under the issue submitted, the alleged preferred creditor will not be heard to complain that he had not introduced pertinent evidence because the various issues tendered by him had been refused by the court. *Ibid.*

7. *Negligence—Assumption of Risks—Issues—Instructions—Procedure.*—In order for a defendant to make the defense of assumption of risk available to him on the trial, it is necessary for him to tender an issue or ask for an instruction thereon. In this case he has received the benefit of the plea under the issue of contributory negligence. *Harvell v. Lumber Co.*, 254.

8. *Deeds and Conveyances — Mortgages — Assignments—Title—Principal and Agent—Payment—Ratification—Issues—How Considered—Invalid Sale—Equities—Charge Upon Land.*—The owner of three tracts of land, by his agent M., gave to B. a sixty-day option on the timber growing thereon, at the price of $1,400. On one of these tracts of land a mortgage had been executed by the owner to a bank to secure an indebtedness of $160, which was assigned to M. by the bank by a writing on the instrument insufficient to pass the title. M. borrowed $150 of B., and gave him the assigned mortgage as security, and without the knowledge of the mortgagor M. foreclosed, and B., the holder of the option, became the purchaser. It was found by the jury in response to two of the issues submitted, that B. had paid $670 and that the mortgagor had received from M. "all the proceeds of the mortgage sale under the agreement": *Held*, (1) the two issues must be considered with reference to the pleadings and evidence; (2) that the word "agreement" referred to the timber option, the only agreement known to the owner; (3) in selling under the mortgage on the land, M. acted as the agent of B., the owner of the mortgage debt; (4) the land mortgaged being in a tract larger than the other two and containing timber estimated at more than one-half of the timber embraced by the option, the $670 paid by M. was the amount due for the timber on that land, which the owner ratified by accepting, and to that timber B. got a clear title; (5) in equity the mortgaged lands

ISSUES—*Continued.*

should only be chargeable with the $160 secured by the mortgage to the bank, in favor of B., who had paid it. *Morton v. Lumber Co.*, 336.

9. *Master and Servant—Independent Duty to Servant—Contributory Negligence—Proximate Cause—Issues.*—Where a negligent default has been established against an employer by reason of some breach of an arbitrary and independent duty which he owes to his employee, as in failure to supply "machinery known and approved and in general use," a disobedience of instructions on the part of the employee and its effects are to be considered and determined, as a rule, on the issues as to contributory negligence, involving also the question of whether such disobedience is the proximate cause of a given injury. *Flanner v. Cotton Mills*, 394.

10. *Appeal and Error—Issues of Fact—Question for Jury.*—In the defendant's appeal it appears that the jury found for plaintiff upon matters of fact properly submitted, and no error is found.—*Carson v. Dawson*, 530.

11. *Divorce a Mensa—Issues—Misconstruction—Wife's Conduct.*—In this action for divorce issues were submitted upon the question of the husband's abandonment and that of the indignities to the wife's person such as would render her condition intolerable, etc.: *Held*, a third issue, "Was the plaintiff a dutiful wife, and without blame on her part?" was too broad, and open to misconstruction. *Dowdy v. Dowdy*, 555.

JUDGMENT. See Estoppel, 1, 2, 3, 4; Habeas Corpus, 4, 5; Homestead, 4; Reference, 7.

1. *Deeds and Conveyances—Warranty—Judgment—Estoppel of Record.*—In an action for damages for breach of warranty in a deed for lands, there was evidence tending to show that in a suit regularly instituted and tried, one W. and others had recovered from plaintiffs a part of the land covered by defendant's warranty. In the former suit nothing appeared to indicate that the location of the land was involved, and in the present suit the issue was whether the *locus in quo* was embraced by the deed and warranty: *Held*, the plaintiff was not estopped by the record in the original suit to show the true location of the land and that the title was protected by the warranty, and, further, to allege and prove damages in his action upon the covenant, it having been only necessary for the plaintiff in the former suit to show paramountcy of title. *Jones v. Balsley*, 61.

JUDGMENT—*Continued.*

2. *Judgments—Payments—Motions to Enter Satisfaction—Lands—Parol Contracts—Statute of Frauds.*—Upon a motion to enter satisfaction of a judgment under Revisal, sec. 579, a defendant may not set up his parol executory agreement to convey lands to plaintiff for that purpose, such not being in the purview of the statute and not enforcible by him under the statute of frauds. *Brown v. Hobbs*, 544.

3. *Injunction—Damages—Cause of Action—Judgment.*—Defendant was restrained from selling plaintiff's land upon plaintiff's application, and *ex mero motu*, as a precaution, the judge restrained plaintiffs from cutting and removing timber. Plaintiffs moved for damages caused by the order restraining them, and it was *Held*, that a judgment upon defendant's motion to dismiss was properly granted, as the damages sought were not recoverable. *Kerr v. R. R.*, 608.

JUDICIAL NOTICE. See Evidence, 51; Courts, 14; Statutes, 8.

JURISDICTION. See Cities and Towns, 2; Habeas Corpus, 5, 6, 7.

1. *Parties—Nonresident Plaintiff—Right of Action—Courts—Jurisdiction.*—A nonresident plaintiff may maintain his action in our courts, and he may recover for work done in constructing a railroad situated in this State, and establish his lien on the roadway so constructed, and bring an attachment thereon. U. S. Constitution, Art. IV, sec. 2; Revisal, sec. 440. *McDonald v. MacArthur*, 122.

2. *Practice — Jurisdiction — Demurrer — Pleadings—Waiver.*—A plea to the jurisdiction of the court over the parties and subject-matter of an action, or that the complaint does not state a cause of action, is not waived by filing an answer, as such may be made at any time, even in the Supreme Court *ore tenus*. *Ibid.*

3. *Courts — Jurisdiction — Foreign Contracts — Parties—Foreign Defendants—Cause of Action Here.*—When an action is brought by a nonresident plaintiff for breach of a written contract signed in another State, the written contract is not the cause of action, but breach in the performance thereof here, and the plaintiff may maintain his action, as the cause thereof arose in this State. Revisal, sec. 440. *Ibid.*

4. *Arbitration and Award—Courts—Jurisdiction—Ouster—Effect—Estoppel.*—When the effect of an agreement to arbitrate controversies which may arise in the course of executing a contract is to oust the jurisdiction of the courts in such matters, it cannot be enforced against one of the parties as a

JURISDICTION—*Continued.*

condition precedent to his bringing his action; though as to other matters embraced therein which have arisen and have been referred to arbitration, and as to which an award has been rendered, the effect of the award is to conclude the parties. In this case amendment to pleadings is suggested so as to conform the issues to matters left in dispute. *Williams v. Mfg. Co.*, 205.

5. *Indictment — Common-law Misdemeanors — Superior Courts—Jurisdiction.*—When an indictment charges an offense indictable at common law it is within the exclusive jurisdiction of the Superior Court. *S. v. Faulk*, 638.

6. *Same—Statutory Offense—Justice of the Peace.*—An indictment charging that the defendant in certain public highways, in the presence of divers persons passing and repassing, "did curse in a loud voice and use profane language for the space of five minutes (reciting the profane words), with great disturbance and to the common nuisance of the good citizens of the State," states the offense of a common-law nuisance, and is within the jurisdiction of the Superior Court, notwithstanding he may have been indicted under a statute relating to a certain county whereunder conviction may have been had of a less offense, made a misdemeanor by the statute, cognizable before a justice of the peace in that county. *Ibid.*

7. *Same.*—An act relating to a certain county, making it "unlawful for any person to act in a disorderly manner by being drunk or using profane, obscene, or boisterous language on any public road" therein, does not oust the jurisdiction of the Superior Court of an indictment going further in its charges, and stating a common-law misdemeanor, though conviction may have been had under the statute. *Ibid.*

JURORS.

1. *Jurors — Employees — Indemnity Company — Incompetency.*—When it appears that a casualty company has indemnified the defendant against loss for personal injuries to the employees, and that plaintiff's alleged cause of action is covered by the policy, it is a cause of challenge if the jurors are interested as agent, or otherwise, in the indemnity company. *Norris v. Mills*, 474.

2. *Jurors—Questions Asked—Exhaust Challenges—Harmless Error.*—Questions asked the jurors by plaintiff in selecting them upon the trial, as to whether they were interested, etc., in defendant's indemnity company, held at least harmless

JURORS—*Continued.*

error, as no juror was excused by reason of the questions asked and the defendant did not exhaust its peremptory challenges. *Ibid.*

3. *Jurors — Cause Pending — Disqualification—Interpretation of Statutes.*—The reason why those having causes pending and at issue are disqualified to serve as jurors is that they should not, under the circumstances, be permitted to serve in close relationship to other jurors who may be called upon to try their cases, and this disqualification does not apply when the cause is pending and at issue, but not to be tried at that particular term of the court. *S. v. Hopkins*, 622.

JUS ACCRESCENDI. See Husband and Wife, 1, 2.

JUSTICE OF THE PEACE. See Jurisdiction, 6.

KNOWLEDGE. See Insurance, 3, 8.

KNOWLEDGE IMPLIED. See Master and Servant, 35.

LANDLORD AND TENANT. See Liens, 5.

LARCENY. See Interpretation of Statutes, 8, 9.

LEASES. See Lessor and Lessee; Contracts.

LEGISLATIVE ACTS. See Statutes; Penalty Statutes.

LEGISLATIVE DISCRETION. See Statutes; Penalty Statutes.

LEGISLATIVE POWERS. See Constitutional Law, 1; Statutes, 1, 5, 7, 10, 11, 13, 14.

LEGITIMACY. See Title, 11, 12, 14; Evidence, 63, 65, 68.

LESSOR AND LESSEE.

1. *Lands—Lessor and Lessee—Hotel—Sewerage—Quiet Enjoyment—Implied Covenant.*—A lease of a hotel equipped with bath tubs, closets, etc., in a city with a sewerage system, etc., carries with it an implied covenant of quiet enjoyment extending to a proper sewerage connection during the term of the lease, unless the lessee has taken the property with notice or knowledge that it was otherwise. *Huggins v. Waters*, 443.

2. *Lands—Leases—Quiet Enjoyment—Covenant—Trespasser.*—A covenant of quiet enjoyment implied from a lease of lands, etc., does not extend to acts of trespassers or wrongdoers, but only to those whose rights are superior to the lessor. *Ibid.*

LESSOR AND LESSEE—*Continued.*

3. *Same—Pleadings—Inconsistent Pleas—Election—Procedure.*—The plaintiff leased a hotel equipped with baths, closets, etc., working with sewerage connections in a city having a sewerage system, and, having entered into possession, found that the sewer connected with the hotel was a private one traversing the lands of an adjoining owner. In an action against his lessor and the adjoining owner he alleged, as to the former, a breach of an implied covenant of quiet enjoyment, and that the latter maliciously, wantonly, and wrongfully stopped up the sewer pipe, to his damage, etc. The cause of action as to both defendants being damages arising from stopping the sewer: *Held*, (1) the wrongful acts alleged as against the adjoining owner were those of trespass or wrongdoing, and inconsistent with the allegations of breach of covenant on the part of the lessor; (2) the action was remanded to the Superior Court so that the plaintiff may elect the cause of action he will prosecute, and amend his complaint accordingly. *Ibid.*

LICENSE. See Attorneys at Law; Contracts, 44.

LICENSEE. See Railroads, 17.

LIENS. See Husband and Wife, 4, 5, 6, 7.

1. *Equitable Liens — Contracts — Possession, Factors'—Liens at Law.*—Equitable liens arise either from written contracts, which show an intention to charge some particular property with a debt or obligation, or are declared by a court of equity from the facts and circumstances of the case, and do not depend upon possession, as do factors' liens and other liens at law. *Garrison v. Vermont Mills*, 1.

2. *Equitable Liens — Form — Equity — Priorities.*— No especial form or phraseology is necessary to create an equitable lien, and a court of equity will look through the form to the substance; and when it appears that the parties intended to charge or pledge property as security to the debt, and the property can be identified, the lien follows, and the court will enforce it against all except those having a superior claim. *Ibid.*

3. *Equitable Liens — Acts of Possession — Consent — Creditors—Registration—Principal and Agent.*—The factor and defendant manufacturing company contracted that the former would advance to the latter three-fourths of the net cash value of the manufactured goods on hand and stored with it, being the value thereof after deducting freights, commissions, etc., the goods to be billed up to the factor and stored

LIENS—*Continued.*

in separate warehouses according to the factor's custom, and insured in his favor. A receiver was appointed for the defendant, but prior thereto, under the arrangement stated, the defendant became indebted to the factor, and the agent of the latter visited defendant's mills in company with its president and other officers, took an inventory of the manufactured goods stored in the basement and warehouse, numbered by bales, pieces, and yards, stated that he took possession for his principal, the factor, and left it in charge of C., as the latter's agent: *Held*, (1) independently of the law regulating factors' liens, this constituted an assertion of control, and a taking of possession, reducing the pledge to the possession of the pledgee before the rights of the creditors under the receivership attached; (2) the undisputed evidence showing that C. had previously left the employment of the defendant, his possession was that of the pledgee; (3) therefore, to enforce the equitable lien against creditors, registration was unnecessary; (4) the factor having the right of possession under the contract, the assent of defendant's officers to his taking possession was unnecessary. *Ibid.*

4. *Equity — Contracts — Specific Performance—Vendor's Lien—Sales—Removal of Causes.*—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is removable to the county in which the land is situated. Revisal, sec. 419. *Councill v. Bailey*, 54.

5. *Mortgages—Principal and Surety—Landlord and Tenant—Liens—Priority.*—The plaintiff, a landlord, became surety on his tenant's note and joined with him in a mortgage of the former's personal property, and on the crops to be raised by the tenant during that crop year. He also made advances to the tenant to enable him to make the crop. The tenant, the defendant, failed to pay the note and his landlord paid it, as surety, and had the note and mortgage assigned to himself: *Held*, the effect of the plaintiff's executing the mortgage was to relinquish his landlord's lien on the crop in favor of the mortgagee, and not to surrender his rights against the tenant; and having paid the note, he could first apply the proceeds of the sale of the crop to the satisfaction of his superior lien as landlord, against the will of the tenant, the defendant. *Lee v. Manly, ante*, 244, cited and distinguished. *Tripp v. Harris*, 296.

LIMITATION OF ACTIONS.

1. *Cities and Towns — Streets—Roads—Dedication—Ratification —Limitation of Actions—Evidence.*—The principle that an abandonment of a public way cannot be presumed, if at all, from nonuse, for any period short of twenty years, has no application where there has been a positive act of dedication and abandonment on the part of the owner, accepted and acquiesced in by the public. *Moore v. Meroney*, 158.

2. *Life Estates—Possession—Remainder—Limitations of Actions.* The possession of a life tenant, however long, can confer no title against the remainderman. *Cox v. Jernigan*, 584.

3. *Deeds and Conveyances — Debtor and Creditor — Equitable Mortgage—Limitations of Actions.*—As the deed for the land to S. was in effect a mortgage to secure the repayment of the purchase price of land he had bought for K., and it appearing that K. had entered into possession of the land since the last payment on the debt, and retained the same for a sufficient length of time, under the statute of limitations, to bar the right of S.: *Held*, that S. is not entitled to recover in this action, which was brought to have the land sold in order to pay the amount advanced by him. *Sandlin v. Kearney*, 596.

LIMITATIONS. See Wills, 5, 6.

LIMITED POWER. See Deeds and Conveyances, 1, 3, 4.

LOGGING ROADS. See Railroads, 7.

"LOOK AND LISTEN." See Railroads, 16, 17, 18, 19, 22, 23.

LOTTERY.

1. *Lottery—Greater Value—Definition—Chance.*—A lottery prohibited by law is a kind of gaming contract by which, for a consideration, one may by favor of the lot obtain something in return of a value superior to the amount or value of that which he risks. *S. v. Perry*, 616.

2. *Same—Chance—Hazard.*—Chance is an essential element of a lottery, whether that chance be as to any return or merely as to the amount or value of the return; and where there is a hazard in which sums are ventured upon the chance of obtaining a greater value, the scheme partakes of a lottery—that is, something gained or won by lot. *Ibid.*

3. *Same—Evidence.*—It appears that the defendant in this case, indicted for conducting a lottery, had formed a club of fifty members, each of whom entered into an agreement with defendant and paid in their money from time to time, with the

LOTTERY—*Continued.*

hope and expectation that they would be so fortunate or lucky as to win by lot a suit of clothes worth a sum greatly in excess of the amount paid by him. After their thirteenth drawing, every member who was not lucky enough to draw a prize sooner, was immediately entitled to a suit, if he had paid as agreed, but in the event of default in any two of these payments, consecutively, it was optional with the defendant to cancel the certificate of membership: *Held*, (1) the plan or scheme was a lottery within the meaning of the statute; (2) the certificate of membership was competent evidence to show the nature and form of the transaction in order to determine as to its legality. *Ibid.*

LUMBER ROADS. See Railroads, 2.

MANDAMUS.

1. *Mandamus—Auditor—Ministerial Duty.*—At the suit of the Governor, a mandamus will lie to compel the Auditor to perform the purely ministerial duty of preparing the forms for assessing and taxing property by the assessors and list takers required by our Constitution and revenue acts. *Kitchin v. Wood*, 565.

2. *Forms—Procedure.*—In our Constitution the property tax is the standard of equation, and by it the poll tax must be measured, and when the Legislature has not observed this equation in levying the poll tax and providing machinery for its collection, the error can be corrected by a mathematical calculation; and at the suit of the Governor a mandamus will lie against the Auditor to compel him to prepare the forms for assessing and taxing the polls in accordance with section 1, Article V of the Constitution. *Russell v. Ayer*, 120 N. C., 180, overruled. *Ibid.*

MANSLAUGHTER.

1. *Murder—Manslaughter—Act of Necessity—Self-defense—Instructions—Presumptions.*—Upon trial on an indictment for murder the judge charged the jury that unless the defendant "has further satisfied you that he killed him (deceased) from necessity or from a principle of self-defense, your verdict must be guilty of manslaughter": *Held*, not reversible error, defendant having failed to send up the charge of the court, and the presumption being that he correctly charged upon the law of self-defense. *S. v. Simonds*, 177.

2. *Murder—Manslaughter—Self-defense—Deadly Weapon—Willings Acts—Burden of Proof.*—It being admitted that defend-

MANSLAUGHTER—*Continued.*

ant killed deceased with a pistol, it is for him to prove that it was done in self-defense, if that plea is relied on; and an objection that there was not sufficient evidence that he acted willingly is not tenable, the law presuming that he did. *Ibid.*

MARRIAGE AND DIVORCE.

1. *Marriage — Seduction — Breach of Promise — Testimony of Prosecutrix — Supporting Evidence — Interpretation of Statutes.*—The testimony of the prosecutrix, on the trial of an indictment for seduction under a promise of marriage, as to the promise, seduction, and her innocence and virtue, supported by the fact that a child was afterwards born to her, and other evidence tending to show that prior to her alleged seduction she had always been of good character, had led a blameless life, and as a schoolgirl had borne a good reputation with her teacher and schoolmates, together with the admission of the defendant that he promised to marry her before the seduction, is supporting evidence under the statute providing that the unsupported testimony of the woman shall not be sufficient to convict. Revisal, sec. 3354. *S. v. Malonee,* 200.

2. *Marriage—Seduction—Breach of Promise—Evidence—Time.*—In an action for breach of promise of marriage the proof of chastity of the woman should relate to the time preceding the seduction or the date when it became known. *Ibid.*

3. *Marriage—Seduction—Breach of Promise—Engagement—Admission—Supporting Evidence.*—The admission by the defendant to the brother of the prosecutrix of his engagement to be married to her is supporting evidence of the promise of marriage, and sufficient if it fully satisfies the jury of the fact. *Ibid.*

4. *Marriage—Seduction—Breach of Promise—Evidence—Causal Connection—Questions for Jury.*—In the trial of an indictment for seduction under the statute, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse; and in this case it may be inferred by the jury under evidence tending to show the reputation, innocence and virtue of the woman, the seduction under the promise, the prior intimacy and relation of the parties, the birth of the child and its resemblance to the defendant and his flight after indictment. *Ibid.*

5. *Marriage — Seduction — Breach of Promise — Instructions — Harmless Error.*—In the trial of this indictment, the re-

MARRIAGE AND DIVORCE—*Continued.*

marks of the court, in the charge, upon the resemblance of the child, as tending to show its paternity, may not have been consistent with perfect accuracy of expression, yet, taken in connection with what preceded and followed, did not constitute reversible error, as they were proper in order to guide the jury in correctly applying the proof. *Ibid.*

6. *Marriage — Seduction — Breach of Promise — Instructions — Weight of Evidence—Questions for Jury.*—The remarks of the judge to the jury upon the flight of the defendant from the State after indictment did not constitute reversible error when considered in connection with all the evidence, as the jury should pass upon the whole evidence and decide what weight should be given the fact of flight, and to what extent the explanatory evidence affected the probative force of the flight as a fact tending to show guilt. *Ibid.*

7. *Divorce a Mensa — Abandonment — Cruel Treatment.*— Abandonment by the husband of his wife in an action by the latter for divorce may be proved by such acts of the husband as amount to cruel treatment sufficient to compel her to leave home. *Dowdy v. Dowdy*, 556.

8. *Same—Wife's Conduct—Burden of Proof.*—The wife in showing abandonment, by her husband's conduct in compelling her to leave home, in her action for divorce, must also show that his cruel conduct was unwarrantable, and not the proximate cause of her own acts done at the time. *Ibid.*

9. *Divorce a Mensa—Issues—Misconstruction—Wife's Conduct.*—In this action for divorce issues were submitted upon the question of the husband's abandonment and that of the indignities to the wife's person such as would render her condition intolerable, etc.: *Held*, a third issue, "Was the plaintiff a dutiful wife and without blame on her part?" was too broad, and open to misconstruction. *Ibid.*

MARRIED WOMEN. See Deeds and Conveyances, 27: Husband and Wife, 4.

MASTER AND SERVANT.

1. *Railroads—Damages—Release—Mental Incapacity—Evidence — Conductor—Nonsuit.*—In this case, reported 151 N. C., 231, it was held necessary, to set aside plaintiff's release for damages for personal injuries sought in his action, for plaintiff to prove that defendant had notice of his mental incapacity at the time. The evidence on this appeal, in addition to that on the former appeal, tends to show that certain let-

MASTER AND SERVANT—*Continued.*

ters indicating his mental soundness, though signed by plaintiff, were written with the aid of his wife and others in view of having him continued in his occupation as defendant's conductor, but this fact was withheld from defendant; there was also evidence tending to show that defendant knew of plaintiff's nervous condition, rendering him incapable of running as conductor, eight months before he signed the release. The amount paid for plaintiff's release was about 94 per cent of the amount of his original demand for damages: *Held,* insufficient to go to the jury on the issue, and defendant's motion for judgment of nonsuit should have been granted. *West v. R. R.,* 24.

2. *Master and Servant—Safe Place to Work—Appliances—Duty of Master.*—The master is not a guarantor of the safety of the servant when engaged in the discharge of his duties, but he is required to use reasonable care and prudence in providing him a safe place to work, and in the selection of such machinery and appliances as are reasonably fit and safe and in general use, and such as a man of ordinary prudence would use, having regard to his own safety, were he supplying them for his own personal use. He is not responsible for a mere error of judgment in their selection, if he exercises due care. *West v. Tanning Co.,* 44.

3. *Master and Servant—Safe Place to Work—Appliances—Burden of Proof.*—In order for a servant to recover damages of the master for an alleged failure to furnish safe machinery and appliances, the servant must show, (1) that the implement furnished by the master was, at the time of the injury, defective; (2) that the master knew of the defect or was negligent in not discovering it and making the needed repairs; (3) that the defect was the proximate cause of the injury. *Ibid.*

4. *Master and Servant—Safe Place to Work—Appliances—Defects—Notice Implied.*—In this case, the unsafe construction of a platform dangerously situated, and erected and permitted to remain for a long time in an unsafe condition, upon which plaintiff was required to go in the performance of his duties, was evidence sufficient to give defendant implied notice thereof, in the performance of its duties to carefully inspect, at reasonable intervals of time, the implements, ways and appliances provided for the use of its servant. *Ibid.*

5. *Same—Negligence—Proximate Cause—Causal Connection.*—In an action to recover damages for the wrongful killing of

MASTER AND SERVANT—*Continued.*

plaintiff's intestate by defendant's negligence in not furnishing him a safe place to work in its tanning works, there was evidence tending to show that the intestate, a lad of 16 years, was employed to oil machinery over vats of water heated from 200 to 210 degrees Fahrenheit, on a platform 8 or 9 feet square, upon which was placed the machinery, consisting of sprocket wheels, belting, etc.; that the platform had been permitted to become filthy and greasy with oil, and was without a guard-rail, but surrounded by a beam forming a rim around its edges 10 inches high, leaving an insufficient space of 10 or 12 inches between the outer rim and the sprocket wheel within which the intestate had to step in oiling; that the usual covering of the vat had, in the lapse of time, been eaten away by acid used in tanning, and that plaintiff was killed by falling into the vat of hot water: *Held*, (1) evidence sufficient to go to the jury upon the question of defendant's negligence in failing to provide the intestate with a safe place to work: (2) the failure to supply such a place was the proximate cause of the injury, there being no evidence in the case of contributory negligence; (3) the struggle of the intestate to keep from falling from the platform, as shown by the handprints and footprints on the grease and dirt, was evidence sufficient, in itself, to show that plaintiff had not otherwise fallen into the vat. *Ibid.*

6. *Master and Servant—Duty to Instruct—Safe Place to Work—Negligence—Accident.*—In an action for damages for injury to plaintiff's foot caused by the falling of a cross-tie upon it while he was at work with two other hands on a car leveling ties, it appeared that the ties had been placed on the car at either end, leaving a space in the middle of the car, where plaintiff was at work, the others working on either side of one of the piles. The hands were left to do the work in their own way, without any special instruction as to the manner of doing it. While they were moving the ties one or two of them fell from a pile, causing the injury: *Held*, (1) the work was simple, requiring no more than ordinary skill and experience, and no instruction as to it was required; (2) the doctrine that it is the master's duty to provide the servant a safe place to work is inapplicable to the facts; (3) the injury was the result of an accident, and the plaintiff cannot recover. *Simpson v. R. R.*, 51.

7. *Master and Servant—Safe Appliances—Requirements.*—The master is not required to adopt every new appliance for the safety of the servant as soon as it is known, but he is

MASTER AND SERVANT—*Continued.*

answerable in damages to the servant for an injury received through his failure to furnish proper appliances that are in general use to do dangerous work. *Bailey v. Meadows Co.*, 71.

8. *Same—Evidence Sufficient.*—The servant was employed to load rails on a car, and was injured while turning one of them after it had been placed on the car. There was evidence tending to show that three railroad companies furnished a certain kind of tongs for this purpose, and had one been furnished the plaintiff the injury would not have occurred: *Held*, evidence sufficient to go to the jury as to the master's liability in failing to furnish a proper appliance to the servant. *Ibid.*

9. *Master and Servant—Negligence—Defects—Duty to Repair—Assumption of Risks.*—An employee whose duty it is to make a second inspection of freight cars before they leave the railroad yards in a train, and to see that the car doors are properly fastened, secured, and in condition, assumes the risks of his employment and cannot recover damages caused by a car door swinging loose and down at one end of the rail at the top, along which the door runs upon wheels, when he is furnished with appliances sufficient to repair a defect at the bottom of the door, readily discernible, and when its repair would have prevented the injury complained of. *Lane v. R. R.*, 93.

10. *Master and Servant—Negligence—Duty of Master—Instructions—Defects.*—The principle that a master is negligent in not instructing the servant in doing the work he is employed to do, or the custom of the master to furnish books of instruction, has no application when the cause of the injury complained of should have been discerned by ordinary observation, and no skill was required of the servant in making repairs which it was his duty to make with the instrumentalities furnished, and which would have prevented the injury complained of. *Ibid.*

11. *Master and Servant—Tortious Act—Respondeat Superior—Test—Employment.*—Upon the question of the responsibility of the master for the acts of the servant, by reason of implied authority, the test is whether the tortious act complained of was committed in the course of the servant's employment and within its scope. *Marlowe v. Bland*, 140.

12. *Same—Tortious Acts—Authority Implied—Evidence.*—When the master has given direction to his servant, a "hired man,"

MASTER AND SERVANT—*Continued.*

to cut and pile cornstalks in his field, which was done by the servant, and then, without direction from the master, and in his absence, he set fire to the stalks, which caused sparks to be carried by the wind, which set fire to and destroyed plaintiff's property, the doctrine of *respondeat superior* does not apply, the thing the master ordered his servant to do being harmless in itself, and there being no express or implied authority given the servant to burn the stalks, which alone caused the damages complained of. *Ibid.*

13. *Master and Servant—Vice Principals—Tests.*—The right of an employee to hire and discharge other servants is not the sole test of this relationship to the master as vice principal, for the principle also obtains when one in charge of other servants is so empowered that the others have just reason for believing that neglect or disobedience of his orders will be followed by their dismissal. *Beal v. Fiber Co.*, 147.

14. *Negligence—Master and Servant—Acts of Clerk—Respondeat Superior.*—The plaintiff was employed in the store of A. and was injured by falling through an open trap-door, usually closed and concealed beneath a movable counter. A. had requested the defendant to do some repair work in the basement of the store, and on this occasion a clerk of A., under A.'s instruction, had shown the workman of defendant the way to his work, had opened the trap for him to descend, and was informed by the workman that he would be in the cellar an hour or two. The clerk failed to close the trap or to guard the opening against accidents, and thus the injury complained of was occasioned: *Held*, as A. had the complete control and management of his own store, he was responsible in damages for the negligence of his clerk in not closing or safeguarding the open trap; that this negligence was the proximate cause of the injury, and under the evidence a motion of nonsuit should have been granted. *Howard v. Plumbing Co.*, 224.

15. *Master and Servant—Negligence—Pleadings—Defective Statement—Answer—Aider.*—In an action for damages by a servant for personal injuries alleged to have been caused by the master's negligence, it was alleged in the complaint that the defendant "allowed its passway to become and remain in an unsafe and dangerous condition where the plaintiff and other employees had to pass and repass in the performance of their duties," and that the injury was caused thereby: *Held*, the plea is defective in not stating wherein the passway and platform had become unsafe and danger-

MASTER AND SERVANT—*Continued.*

ous, but it is a defective statement of a cause of action which was aided by answer. *Harvell v. Lumber Co.*, 254.

16. *Master and Servant—Safe Place to Work—Negligence—Evidence.*—A servant having brought his action against his master for damages arising from the latter's alleged negligence in permitting a hole to remain in a passway on a platform where the former was required to work, the defendant's testimony that the hole had been repaired by placing boards over it, and that the injury complained of was caused by plaintiff's stumbling and breaking a board, and that there were thicker boards at defendant's plant, and the one used was not thick enough, is some evidence that the passway was unsafe after the repairs were made. *Ibid.*

17. *Master and Servant—Obvious Danger—Rule of the Prudent Man.*—With respect to his own safety in doing work where it is necessary for him to go on the master's premises, it is the duty of the servant to observe, and he is chargeable with those conditions he could discover by the exercise of ordinary care; but he is not guilty of contributory negligence because he works in the presence of danger, unles it is so obvious that a man of ordinary prudence would have refused to do so. *Ibid.*

18. *Master and Servant—Instructions to Servant—Inexperienced Servant—Dangerous Machinery—Questions for Jury.*—If an employee is instructed by the master to do a dangerous act without warning against danger, he having had no experience in doing the act, the question of negligence is for the jury. *Walters v. Sash and Blind Co.*, 323.

19. *Same—Dangerous Machines—Repair—Obvious Danger—Rule of the Prudent Man—Contributory Negligence—Questions for Jury.*—The plaintiff, an employee 19 years of age, was changed, under his protest, from working at a harmless machine to a dangerous one, the latter machine being badly out of repair and containing revolving knives run by machinery. The plaintiff showed his superior that the result of the work upon the machine was unsatisfactory, and was instructed to do the best he could; also, to "get a monkey-wrench and see if he could raise the bed back to its proper place." The bed having slipped down, left the revolving knives exposed, and while the plaintiff was endeavoring to raise the bed with a worn monkey-wrench, the wrench slipped from a nut he was working on, and his fingers were cut off by the revolving knives: *Held*, (1) it was negligence for the master not to have instructed the servant in the opera-

MASTER AND SERVANT—*Continued.*

tion of the dangerous machine, and in ordering him to repair it without instructions as to stopping it, etc.; (2) there being no evidence that plaintiff knew of the danger in attempting to repair the machine, the danger was not so obvious that a reasonably prudent man would not have undertaken it, and a judgment of nonsuit was improperly allowed. *Ibid.*

20. *Railroads — Fellow-servants — Logging Roads.*—The Fellow-servant Act (Revisal, 2646) applies to logging roads using the agency of steam. *Bissell v. Lumber Co.*, 152 N. C., 125, cited and approved. *Roberson v. Lumber Co.*, 328.

21. *Carriers of Passengers—Master and Servant—Fellow-servant —Employee.*—An employee of a railroad who customarily used the trains of the company in going to and from his work is a passenger while so doing. *Ibid.*

22. *Railroads—Master and Servant—Employees—Usage—Actionable Negligence—Warning.*—The plaintiff, an employee of defendant railroad, boarded the defendant's train for the purpose of going home from his work, which had been customary: *Held*, it was actionable negligence for the employees of the train to suddenly start the train forward, without notice or warning, while the plaintiff was getting off at his usual place, and thus causing him to be thrown to the ground to his injury. *Ibid.*

23. *Master and Servant—Independent Duty to Servant—Contributory Negligence—Proximate Cause—Issues.*—Where a negligent default has been established against an employer by reason of some breach of an arbitrary and independent duty which he owes to his employee, as in failure to supply "machinery known and approved and in general use," a disobedience of instructions on the part of the employee and its effects are to be considered and determined, as a rule, on the issue as to contributory negligence, involving also the question of whether such disobedience is the proximate cause of a given injury. *Flanner v. Cotton Mills*, 394.

24. *Same — Ordinary Work — Instructions — Disobedience—Negligence.*—Where no breach of an arbitrary or independent duty of an employer to his employee is shown, and the former, having the latter to do an ordinary piece of work, gives him instructions concerning it which provide and afford a simple and safe method of doing the work, his instructions may also be considered in reference to his responsibility on the first issue, as to his negligence; and if it is shown

MASTER AND SERVANT—*Continued.*

that conditions have been changed and work of the kind indicated rendered dangerous by reason of the employee's willful disobedience, that the employer did not approve or encourage, no responsibility should attach to him; and this position, as a rule, is not affected by the view the employee may take of his surroundings. *Ibid.*

25. *Same—Evidence—Instructions.*—The plaintiff was employed by the defendant to dig in a sand pit 13 feet long, 8 feet wide at the top and 8 feet deep. There was evidence for defendant tending to show that there was no danger in digging in the pit if the sides were "flammed" or sloped, and that in violation of instructions the plaintiff continued to dig straight down or undermine the side, and in consequence it caved in on him to his injury: *Held correct*, an instruction tendered by defendant, in substance, that if they believed the evidence of defendant they should answer the first issue, as to defendant's negligence, "No"; and it was error to so modify the instruction as to make their answer to the issue depend upon whether the plaintiff, while in the pit, could see and appreciate his surroundings when digging in disobedience to his instructions. *Ibid.*

26. *Master and Servant—Duty of Master—Breach—Burden of Proof.*—In an action to recover damages on account of negligence, the burden is upon the plaintiff to satisfy the jury that defendant owed him a duty at the time of his injury; that there was a breach of that duty, and that this breach was the cause of the injury. *Mercer v. R. R.*, 399.

27. *Master and Servant—Tools and Appliances—Duty to Inspect—Simple Tools—Equality of Knowledge—Defects.*—With reference to simple tools, such as hammers and the like, the employer is not charged with the duty of inspection to see that they are in proper condition for the use of the employee, for ordinarily the employee is presumed to be equally conversant with the tools as the employer, and, being required to use them, is in a better situation to discover the defects; but if the employee has no power of selection or opportunity for inspection, the employer is held to the duty of furnishing a tool reasonably safe, as in such cases there is no equality of knowledge. *Ibid.*

28. *Same—Negligence—Damages.*—When there is no equality of knowledge between the employer and employee with respect to simple tools the former furnishes the latter with which to do his work, the employee has the right to assume that the employer has performed his duty in respect to furnish-

MASTER AND SERVANT—*Continued.*

ing him the proper one; and this duty the employer may not delegate to another and escape liability for damages caused by its negligence. *Ibid.*

29. *Same—Evidence—Questions for Jury.*—While plaintiff was striking with a sledge hammer a chisel held by defendant's boiler-maker while cutting slack rivets from a boiler, in the course of his employment, a piece of the chisel, under a blow from the hammer, flew off and injured the plaintiff's eye, causing the damage alleged in the action. There was evidence tending to show that it was the duty of the boiler-maker, whom plaintiff was employed to assist, to keep the tools in repair; that plaintiff had been working as his assistant for about a month, and that he handed a chisel to plaintiff to use, which the latter did without opportunity for inspection; that the head of the chisel was too large, and the chisel itself too thin, etc.; that plaintiff struck with the hammer when and as directed by the boiler-maker: *Held*, under the rule, viewing the evidence in its most favorable light for the plaintiff, the question as to defendant's negligence was one for the jury to determine. *Martin v. Mfg. Co.*, 128 N. C., 264, cited and distinguished. *Ibid.*

30. *Negligence—Defective Machinery—Subsequent Defects—Evidence.*—When the defendant has testified, in an action by its employee for damages alleged from the furnishing and use of a defective machine, that the machine had not been changed since the injury and no other injury had been thereby inflicted, it is competent for the plaintiff to show, as evidence of defendant's negligence, that the defect still exists. *Norris v. Mills*, 474.

31. *Negligence—Master and Servant—Safe Place to Work—Safe Appliances—Evidence—Assumption of Risks—Questions for Jury.*—The plaintiff was employed to pack lint cotton in defendant's packing-room at its cotton mills as it was blown there with the use of steam fans, the room being 7 feet wide, 14 feet long and 14 feet high. There was evidence tending to show that the door to this room was negligently bolted from the outside, and that through the negligence of the defendant in not keeping the oil cups of the engine in proper repair and in not securely fastening the engine, the lint cotton caught afire while plaintiff was at work, to his damage; that he had to force open the door, as no one heard his calls; that while fire from the ignited cotton covered the room he had to dig down through the cotton to the door, which should have been opened from the inside, and that to get out it was

MASTER AND SERVANT—*Continued.*

customary to call to employees on the outside; that the machinery had not been inspected during the six months of plaintiff's employment; that another like machine used by defendant did not shake while in operation; and that the fire originated at the bearings of the defective machine, and that lint cotton was on the machinery and connecting pipes. The judge correctly charged upon the questions of *res ipsa loquitur*, of accident, of the duty of the master to furnish his servant a safe place to work, of the master's duty to furnish and inspect the appliances used, and it is *Held,* (1) the evidence is sufficient to go to the jury upon the question of defendant's negligence; (2) that an employee does not assume the risk of an injury caused by the failure of the master to perform a duty imposed on him by law, in furnishing a safe place to work, and this duty cannot be delegated to another so as to exempt the master from liability. *Ibid.*

32. *Master and Servant—Defective Machine—Contributory Negligence—Evidence—Instructions.*—In an action by an employee to recover damages of his employer for a personal injury received in operating a planing machine in defendant's mill, there was evidence tending to show that the machine had revolving cogs operated by steam power, which were left unboxed and exposed, and that a feed gear or shift by which the power was applied and shut off was defective, all of which had been called to defendant's attention. The plaintiff admitted the necessity of shutting off the power before attempting to relieve a choked condition of the machine, and there was contradictory evidence as to whether he waited, after shutting off the power, until the wheels stopped revolving, before attempting to clear the machine, wherein the injury was inflicted: *Held,* the conflict of evidence presented an issue of fact to the jury, and it was error to refuse to instruct the jury that plaintiff was guilty of contributory negligence, should they find that he placed his hand in the machine before the cogs stopped revolving, after he had shut off the motive power, and was thereby injured. *Bryan v. Lumber Co.,* 485.

33. *Railroads — Crossings — Negligence — Master and Servant — Scope of Employment.*—At a public crossing over defendant's road where there were a large number of defendant's railroad tracks, plaintiff was employed by it as a watchman to warn those desiring to cross of danger in their doing so which might then exist. At the time in question plaintiff, in the discharge of his duties, desired to warn a person pre-

MASTER AND SERVANT—*Continued.*

paring to cross of his danger from a shifting engine, and, after listening for the approach of locomotives without hearing anything, attempted to cross the track for the purpose of the contemplated warning, and was injured by an engine of defendant passing on the main line. There was evidence tending to show that the plaintiff was watching the shifting engine and the person he desired to warn, at the time he received his injury, and that the engine which injured him came without signals or warnings from a direction where the view was obstructed by cars standing on side or lateral tracks to the main line: *Held*, (1) under these circumstances the defendant owed plaintiff the positive duty by active vigilance to warn him, by proper signals, of the approach of the locomotive, and the question of contributory negligence was properly submitted to the jury; (2) the plaintiff was not held to have assumed the risks of the defendant's negligent failure to give the proper signals or warnings of its passing locomotive. *Wolfe v. R. R.*, 569.

34. *Master and Servant — Contributory Negligence — Evidence — Negligence.*—In an action for damages by one employed by a railroad company as a brakeman, alleged on account of his acting in obedience to instructions in getting on defendant's moving freight train: *Semble*, the evidence relied on to excuse him from contributory negligence, under the rule of the prudent man, would also exonerate the defendant from the charge of negligence. *Wiggins v. R. R.*, 577.

35. *Master and Servant—Accepting Employment—Implied Knowledge.*—By entering into a contract with a railroad company to perform the services of a brakeman on a freight train, there is an implied representation by the one thus accepting the position, nothing else appearing, that he knew the duties and how to perform them. *Ibid.*

36. *Same—Dangerous Employment—Instructing Servant—Duty of Master.*—It appears from the evidence that the plaintiff accepted a position with defendant railroad company as a brakeman on one of its freight trains, and after having safely gotten on the train several times when it was moving, he was injured on the day of his employment while attempting to get on a coal car with the train moving from 4 to 6 miles an hour; that he had been instructed at the time by the conductor to get on the caboose, which, from the arrangement of the steps, door, and side bars or holds, was less dangerous; and that it was customary for brakemen to get on the train when moving at the rate of speed of this one. The negligence alleged was the failure of the defendant to

MASTER AND SERVANT—*Continued.*

instruct plaintiff in the performance of his duties: *Held,* a motion to nonsuit plaintiff upon the evidence was properly allowed, as therefrom it did not appear that plaintiff was inexperienced or that any special instruction was required. *Ibid.*

MEASURE OF DAMAGES. See Damages.

1. *Deeds and Conveyances—Damages—Notice to Covenantor—Reasonable Attorneys' Fees.*—The grantee in a deed, with warranty, to lands, being sued for title and possession of a part thereof, informed the warrantor of the pendency of the action, stating that he intended to defend the suit: *Held,* notice sufficient in law to charge the covenantor with all costs incurred by the covenantee in defending the action in good faith, including reasonable attorneys' fees, as such were impliedly within the contemplation of the parties, though no express request was made of the covenantor to defend the action, the notice given, under the circumstances, being a sufficient "tender of the defense." *Jones v. Balsley,* 61.

2. *Contracts — Interpretation — Railroads—Material Delivered—Accessibility—Additional Work—Damages.*—In an action to recover a balance alleged to be due the plaintiff under his contract with defendant to build a railroad trestle, and for damages for failure to supply material stipulated for in the manner provided for in the contract, it appeared from the contract sued on that the defendant agreed "to deliver all material for the trestle on cars or on the ground within 300 feet of the trestle, and to be furnished in such manner and time as not to impede the plaintiff (contractor) in the performance of his part of the contract": *Held,* (1) the contract contemplated that defendant should deliver the material within 300 feet of the work, at a point from which a haul could be made to the best advantage, having reasonable regard to the nature of the ground and the attendant facts and circumstances; (2) that under a contract of this character and extent, requiring completion within a specified time, delivery of the material within the specified distance from the work, but across a slough, requiring an additional haul of half a mile, was not such delivery by defendant as called for in the contract, and for such additional work the plaintiff was entitled to recover extra compensation. *Brown v. R. R.,* 300.

3. *Contracts—Breach—Appliances—Definite Rental—Measure of Damages.*—When a building or a given machine is shown to have a definite rental value, and the opportunity for obtain-

MEASURE OF DAMAGES—*Continued.*

ing it is lost by another's breach of contract, the rental value of the machine usually affords a better basis for the ascertainment and award of damages, subject to the rule that the damages must have been in the reasonable contemplation of the parties and capable of ascertainment with a reasonable degree of certainty. *Rocky Mount Mills v. R. R.*, 119 N. C., 693, holding that interest on the value is the proper measure of damages, and other like cases cited and distinguished. *Ibid.*

4. *Same—Railroads—Pile Drivers.*—In an action by plaintiff to recover damages of the defendant railroad alleged by breach of contract requiring the latter to supply at certain places, under the terms of the contract, material for the former to build a trestle, there was a confirmation by the lower court of the referee's findings, upon evidence to support them, that by reason of such delay plaintiff's pile driver remained idle for thirty days at a net rental value of $2.50 per day, and this was not infrequently rented by plaintiff for a definite sum: *Held*, the measure of damages was the rental value of the pile driver for the time it remained idle through defendant's default, under the contract. *Ibid.*

5. *Timber Deeds—Wrongful Cutting—Under Size—Prospective Value—Damage to Land.*—In an action against the grantee in a timber deed for damages alleged as arising from cutting timber less than the size specified in the deed, the plaintiff cannot recover the prospective value of the trees, but the jury may consider their value in determining the injury to the land, the measure of damages being the decrease in the value of the land by reason of the cutting, or the difference in the value before and after the cutting. *Williams v. Lumber Co.*, 306.

6. *Same—Questions—Evidence—Record.*—While the court does not commend the questions asked in this case to ascertain the damages to the land by reason of the grantee in a timber deed cutting timber less than the size allowed by the deed, they are considered in connection with the other parts of the record, especially the judge's charge, and no reversible error is found. *Ibid.*

7. *Timber Deeds—Wrongful Cutting—Under Size—Damages to Land—Measure.*—In an action against the grantees in a timber deed for damages to the land by cutting timber of less dimension than specified, and too small to have a market value as merchantable timber: *Held*, competent for the jury

MEASURE OF DAMAGES—*Continued.*

to consider the species of the trees, whether of rapid or slow growth, or whether it would be merchantable when it attained its size, the nature and drainage of the soil, the facilities for marketing, and any other relevant facts to enable them to determine its value at the time of the cutting, and the effect of the cutting on the value of the land. *Whitfield v. Mfg. Co.*, 152 N. C., 214, and like cases cited and distinguished, where the trees were "timber trees." *Ibid.*

8. *Same—Defense—Probable Growth.*—A timber deed conveyed for value "all the pine timber that is now or may be standing, etc., during the term of this lease (five years), 15 inches in diameter at a point 2 feet above the ground"; and provided that the timber should not be cut over more than one time. In an action for damages begun after the lapse of five years, for damages to the land for cutting timber less than the specified size: *Held*, the defense was not available that the trees cut would have attained the specified size during the term of five years. *Ibid.*

9. *Appeal and Error—"Case Settled"—Negligent Killing—Measure of Damages—Net Earnings—Support of Family.*—In an action for damages for the wrongful killing of plaintiff's intestate, it is not error to refuse an instruction which limited recovery to the net earnings, after deducting the cost the deceased would have incurred in supporting his family depending upon him, the object of the statute being to render compensation as near as may be for the actual money value of the life by estimating the present cash value of his probable net earnings above the necessary expenses for his own support. *Roberson v. Lumber Co.*, 328.

10. *Timber Deeds — Contracts — Trees Under Size — Measure of Damages.*—The measure of damages in an action against the grantee in a timber deed for the wrongful cutting of trees under the size specified in the contract is the difference between the value of the land before and after the wrong was committed, or the amount by which the land was diminished by the trespass. *Jenkins v. Lumber Co.*, 355.

MEETINGS. See Religious Societies, 2.

MENTAL ANGUISH. See Negligence, 7.

MENTAL INCAPACITY. See Damages, 1.

MINISTERIAL DUTY. See Mandamus, 1.

MISDEMEANOR, COMMON LAW. See Courts, 19, 20, 21.

MORTGAGE.

1. *Debtor and Creditor—Mortgage—Proceeds—Payment—Application—Questions for Jury.*—When the debtor owes a debt secured by a chattel mortgage, and another debt not secured, and makes payment to his creditor, with a part of the proceeds of the property secured by the mortgage, of which the creditor was aware, the execution of the mortgage was an application of the payment upon the debt it secured, which the creditor cannot change without the debtor's consent, and upon conflicting evidence presents a case for the jury upon the issue. *Lee v. Manley*, 244.

2. *Debtor and Creditor—Mortgage—Tender—Payment—Application.*—To make a good tender of payment of an amount secured by a mortgage, it is necessary for the debtor to allege and show, in addition to the offer, that he has at all times since the tender been ready, able, and willing to pay, and accompany the plea by payment of the money into court. *Dickerson v. Simmons*, 141 N. C., 330, where the tender was made upon the maturity of the debt; and *Smith v. B. and L. Assn.*, 119 N. C., 261, in relation to tender by a surety, cited and distinguished. *Ibid.*

3. *Mortgages—Principal and Surety—Payment by Surety—Assignment of Mortgage — Debtor and Creditor — Security.*—When the surety pays a note of his principal, and has the note and a mortgage securing it transferred directly to himself, he becomes a simple contract creditor of the principal and the owner of the mortgage to secure the payment of the debt. This case is distinguished from those wherein a judgment has been obtained against the principal and surety, or where there is a mortgage and the rights of third persons as creditors or purchasers have intervened. *Tripp v. Harris*, 296.

4. *Same—Landlord and Tenant—Liens—Priority.*—The plaintiff, a landlord, became surety on his tenant's note and joined with him in a mortgage of the former's personal property and on the crops to be raised by the tenant during that crop year. He also made advances to the tenant to enable him to make the crop. The tenant, the defendant, failed to pay the note, and his landlord paid it, as surety, and had the note and mortgage assigned to himself: *Held*, the effect of the plaintiff's executing the mortgage was to relinquish his landlord's lien on the crop in favor of the mortgagee, and not to surrender his rights against the tenant; and having paid the note, he could first apply the proceeds of the sale of the crop to the satisfaction of his superior lien as land-

MORTGAGE—*Continued.*

lord, against the will of the tenant, the defendant. *Lee v. Manly, ante,* 244, cited and distinguished. *Ibid.*

5. *Deeds and Conveyances — Mortgages — Assignments — Seal — Title—Trusts and Trustees.*—The grantee in a mortgage deed assigned the deed under a writing thereon as follows: "For value received, the F. and M. Bank hereby bargains and sells to M., his heirs and assigns, this mortgage and all its rights, title, and interest to the property therein, together with all rights and powers contained in said mortgage, without recourse to said bank." The assignment was signed by the proper officers of the bank, and it is *Held,* (1) lacking the seal, the assignment could not operate as a conveyance by the corporation; (2) if with the corporate seal, the assignment was solely of the mortgage deed, the written instrument of conveyance, and the security it affords to the holding of the debt, and it did not convey to the assignee the legal title subject to the trusts and powers contained in the mortgage. *Morton v. Lumber Co.,* 336.

6. *Same—Foreclosure—Procedure—Rights of Assignee.*—Under an assignment by the mortgagee of the deed, insufficient to pass the legal title, the assignee acquires only the mortgage debt and the right by proper legal proceedings to subject the lands to its payment. *Ibid.*

7. *Deeds and Conveyances — Mortgages — Assignments—Title—Principal and Agent—Payment—Ratification—Issues—How Considered—Invalid Sale—Equities—Charge Upon Land.*—The owner of three tracts of land, by his agent M., gave to B. a sixty-day option on the timber growing thereon, at the price of $1,400. On one of these tracts of land a mortgage had been executed by the owner to a bank to secure an indebtedness of $160, which was assigned to M. by the bank by a writing on the instrument insufficient to pass the title. M. borrowed $150 of B., and gave him the assigned mortgage as security, and without the knowledge of the mortgagor M. foreclosed, and B., the holder of the option, became the purchaser. It was found by the jury in response to two of the issues submitted that B. had paid $670 and that the mortgagor had received from M. "all the proceeds of the mortgage sale under the agreement": *Held,* (1) the two issues must be considered with reference to the pleadings and evidence; (2) that the word "agreement" referred to the timber option, the only agreement known to the owner; (3) in selling under the mortgage on the land, M. acted as the agent of B., the owner of the mortgage debt; (4) the land mort-

MORTGAGE—*Continued.*

gaged being in a tract larger than the other two and containing timber estimated at more than one-half of the timber embraced by the option, the $670 paid by M. was the amount due for the timber on that land, which the owner ratified by accepting, and to that timber B. got a clear title; (5) in equity the mortgaged lands should only be chargeable with the $160 secured by the mortgage to the bank, in favor of B., who had paid it. *Ibid.*

8. *Mortgagor and Mortgagee — Contracts — Private Sale — Purchaser—Purchase Price.*—One who purchases land at a certain price, on which there was a mortgage, at a private sale from the mortgagee, who cancels his mortgage and thus gives a clear title to the land, is required to pay the price agreed upon without reference to any agreement between the mortgagor and mortgagee as to what part of the difference between the amount of the mortgage and the purchase price each was to receive; and the fact in this case, that the mortgagee, who negotiated the sale, received $200 more than his mortgage debt, has no bearing upon the matter. *Wooten v. Borden*, 370.

9. *Insurance, Fire—Cancellation—Substitution—Mortgagor and Mortgagee—"Loss Payable" Clause—Estoppel—Equity.*—The defendants, three fire insurance companies, issued several policies on a mortgaged premises with the usual loss clause, payable to the mortgagee. One of them solicited, through its agent, a policy in substitution of the three policies, and issued a policy accordingly, claiming through its general agent the premiums therefor. In this policy there was no clause with loss payable to the mortgagee, and it appears that he was not aware of the change of policies until after the property was destroyed by fire and the insurance due. The other companies were notified, and canceled their policies, sending them to the mortgagor, requesting a return of the canceled policies, which were not returned because of their being in possession of mortgagee. In an action by the mortgagor and mortgagee against the three companies to recover the insurance due by the loss by fire of the premises: *Held*, (1) the insurance company issuing the substituted policy and the mortgagor are estopped by their conduct to deny the cancellation of the three original policies and the substitution of the later one in lieu thereof; (2) the release of the three original policies was only binding between the parties to the agreement, and not upon the mortgagee; (3) the mortgagee is entitled to judgment for one-third part of

MORTGAGE—*Continued.*

his debt against each of the three original policies, to be canceled upon payment of his loss out of the substituted policy. *Lee v. Insurance Co.*, 446.

10. *Deeds and Conveyances—Interpretation of Deeds—Security—Debt—Equitable Mortgages.*—When the real object of a conveyance of land is to provide a security for a loan or debt, equity will regard the conveyance as a mortgage, and will look beyond the mere form of the conveyance and the words therein employed, to ascertain the true intent of the parties respecting the transaction. *Sandlin v. Kearney*, 596.

11. *Same—Debtor and Creditor—Implied Promise of Repayment.*—When one, at the request of another, purchases and pays for land for the latter, the law implies a promise on the part of the one for whom the purchase was made that he will repay the purchase price, with interest, thus establishing the relationship of creditor and debtor; and when the one thus acting for the other takes the deed to himself, equity will regard the deed as being in the nature of a mortgage to secure the money advanced by him. *Ibid.*

12. *Same—Legal Title—Principal and Agent.*—S., at the request of K., purchased certain lands for him, paid the purchase price and had the deed made to himself, and from the admissions in the pleadings it appears that it was done under a parol agreement that he was to convey to K. upon the repayment by the latter of the purchase price and interest. The statute of frauds was not pleaded: *Held*, (1) under the admissions in the pleadings, equity will regard the deed to S. in the nature of a mortgage to secure the repayment of the purchase price of the land; (2) the purchase of the land by K. through S. was in effect as if K. had made the purchase himself; (3) it was not necessary to the equity of K. that he should have held the legal title; (4) the effect of the transaction was governed by the agreement between S. and K. without regard to what the vendor may have understood. *Ibid.*

13. *Deeds and Conveyances — Debtor and Creditor — Equitable Mortgage—Limitations of Actions.*—As the deed for the land to S. was in effect a mortgage to secure the repayment of the purchase price of land he had bought for K., and it appearing that K. had entered into possession of the land since the last payment on the debt, and retained the same for a sufficient length of time, under the statute of limitations, to

MORTGAGE—*Continued.*

bar the right of S.: *Held,* that S. is not entitled to recover in this action, which was brought to have the land sold in order to pay the amount advanced by him. *Ibid.*

MORTGAGOR AND MORTGAGEE. See Mortgage.

MURDER.

1. *Murder — Manslaughter — Act of Necessity—Self-defense—Instructions—Presumptions.*—Upon trial on an indictment for murder the judge charged the jury that unless the defendant "has further satisfied you that he killed him (deceased) from necessity or from a principle of self-defense, your verdict must be guilty of manslaughter": *Held,* not reversible error, defendant having failed to send up the charge of the court, and the presumption being that he correctly charged upon the law of self-defense. *S. v. Simonds,* 197.

2. *Murder—Manslaughter—Self-defense—Deadly Weapon—Willing Acts—Burden of Proof.*—It being admitted that defendant killed deceased with a pistol, it is for him to prove that it was done in self-defense, if that plea is relied on; and an objection that there was not sufficient evidence that he acted willingly is not tenable, the law presuming that he did. *Ibid.*

3. *Murder, First Degree—Evidence Sufficient.*—The evidence in this case tended to show that the deceased, a chief of police of a town, went with a posse to arrest the prisoner at the latter's home at night; that he called the prisoner to come to the door; that the prisoner recognized the deceased as the chief of police and knew he had a warrant for his arrest; that the deceased waited about twenty to twenty-five minutes for the prisoner, who said he first wished to put on his shoes, and then asked the prisoner to come on, he was in a hurry; that the prisoner then said he was not coming, as deceased had a warrant for his arrest, and that then, at the prisoner's direction, his wife opened the door, as all of the lights went out, when the prisoner fired a gun directly into the breast of the officer, inflicting a wound from which he soon thereafter died. Under a correct charge, wherein the crime of murder in the first degree was defined: *Held,* evidence sufficient for conviction of murder in the first degree. *S. v. Lewis,* 632.

MUTUALITY. See Estoppel, 3, 4.

MUTUAL MISTAKE. See Deeds and Conveyances, 45.

NAVIGABLE WATERS. See Waters and Water Courses, 1, 2.

NEGLIGENCE. See Contributory Negligence.

1. *Master and Servant—Safe Place to Work—Appliances—Defects—Notice Implied.*—In this case, the unsafe construction of a platform dangerously situated, and erected and permitted to remain for a long time in an unsafe condition, upon which plaintiff was required to go in the performance of his duties, was evidence sufficient to give defendant implied notice thereof, in the performance of its duties to carefully inspect, at reasonable intervals of time, the implements, ways and appliances provided for the use of its servant. *West v. Tanning Co.*, 44.

2. *Same—Negligence—Proximate Cause—Causal Connection.*—In an action to recover damages for the wrongful killing of plaintiff's intestate by defendant's negligence in not furnishing him a safe place to work in its tanning works, there was evidence tending to show that the intestate, a lad of 16 years, was employed to oil machinery over vats of water heated from 200 to 210 degrees Fahrenheit, on a platform 8 or 9 feet square, upon which was placed the machinery, consisting of sprocket wheels, belting, etc.; that the platform had been permitted to become filthy and greasy with oil, and was without a guard-rail, but surrounded by a beam forming a rim around its edges 10 inches high, leaving an insufficient space of 10 or 12 inches between the outer rim and the sprocket wheel within which the intestate had to step in oiling; that the usual covering of the vat had, in the lapse of time, been eaten away by acid used in tanning, and that plaintiff was killed by falling into the vat of hot water: *Held*, (1) evidence sufficient to go to the jury upon the question of defendant's negligence in failing to provide the intestate with a safe place to work; (2) the failure to supply such a place was the proximate cause of the injury, there being no evidence in the case of contributory negligence; (3) the struggle of the intestate to keep from falling from the platform, as shown by the handprints and footprints on the grease and dirt, was evidence sufficient, in itself, to show that plaintiff had not otherwise fallen into the vat. *Ibid.*

3. *Master and Servant—Duty to Instruct—Safe Place to Work—Negligence—Accident.*—In an action for damages for injury to plaintiff's foot caused by the falling of a cross-tie upon it while he was at work with two other hands on a car leveling ties, it appeared that the ties had been placed on the car at either end, leaving a space in the middle of the car, where plaintiff was at work, the others working on either

NEGLIGENCE—*Continued.*

side of one of the piles. The hands were left to do the work in their own way, without any special instruction as to the manner of doing it. While they were moving the ties one or two of them fell from a pile, causing the injury: *Held*, (1) the work was simple, requiring no more than ordinary skill and experience, and no instruction as to it was required; (2) the doctrine that it is the master's duty to provide the servant a safe place to work is inapplicable to the facts; (3) the injury was the result of an accident, and the plaintiff cannot recover. *Simpson v. R. R.*, 51.

4. *Master and Servant—Safe Appliances—Evidence Sufficient.*—The servant was employed to load rails on a car, and was injured while turning one of them after it had been placed on the car. There was evidence tending to show that three railroad companies furnished a certain kind of tongs for this purpose, and had one been furnished the plaintiff the injury would not have occurred: *Held*, evidence sufficient to go to the jury as to the master's liability in failing to furnish a proper appliance to the servant. *Bailey v. Meadows Co.*, 71.

5. *Master and Servant—Negligence—Duty of Master—Instructions—Defects.*—The principle that a master is negligent in not instructing the servant in doing the work he is employed to do, or the custom of the master to furnish books of instruction, has no application when the cause of the injury complained of should have been discerned by ordinary observation, and no skill was required of the servant in making repairs which it was his duty to make with the instrumentalities furnished, and which would have prevented the injury complained of. *Lane v. R. R.*, 91.

6. *Same—Delayed Delivery—Service Message—Notice to Sender—Negligence.*—When a telegram is received after office hours by a telegraph company upon condition that it will be delivered at destination "if there was nothing the matter at the other end of the line," and the defense of the company, in an action for damages for delayed delivery, is that delivery could not have been promptly made because it was received at destination after office hours and there was no one by whom to send the message to addressee, the burden is upon the defendant and it is its duty to show that it had notified the sender of the fact; and evidence is insufficient which merely tends to show that a service message was sent back, but not delivered to the sender. *Carswell v. Telegraph Co.*, 112.

NEGLIGENCE—*Continued.*

7. *Telegraphs — Negligence—Physician—Mental Anguish—Notice —Damages.*—A telegram sent to a physician reading, "Come at once. My wife very sick," is sufficient to notify a telegraph company that mental anguish will result to the husband from a negligent delay in its delivery; and the husband may recover damages for the delay, caused by the defendant's negligence, in not sooner having the doctor in attendance upon his sick wife. *Ibid.*

8. *Same—Public-service Corporations—Negligence—Stipulations.* A corporation engaged in furnishing electric power and lights to its patrons in the exercise of chartered rights and privileges conferred by the lawmaking power, in part for the public benefit, are *quasi*-public corporations, and may not stipulate against their own negligence or transfer the obligations incumbent upon them, in the absence of legislative authority to do so. *Turner v. Power Co.*, 131.

9. *Negligence — Evidence — Res Ipsa Loquitur.*—When a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from a want of care. *Ibid.*

10. *Same—Burden of the Issue—Questions for Jury.*—Where the doctrine of *res ipsa loquitur* applies, the question of a defendant's responsibility must be referred to the jury, not under any presumption changing the burden of the issue, but as presenting a cause in which evidence has been offered from which negligence on the part of the defendant may be inferred. *Ibid.*

11. *Contracts—Independent Contractor—Negligence—Evidence.*— The servant alleging damages in his action against the master as proximately caused by a negligent order of the latter's vice principal, given while erecting a three-story building, there was evidence tending to show: that the servants were engaged in hoisting heavy timbers, and that the usual way to hoist one of them was to place it beneath a "crab" and hoist on a perpendicular; that on the occasion of the injury the rope was fastened to a timber some distance off, giving it a slant and throwing the line beneath and against a rafter which had just before been raised and which rested on the beam where the timbers were to be placed; that in the performance of his duties the plaintiff was standing near the

NEGLIGENCE—*Continued.*

end of this timber preparing to throw the tag rope to a fellow-servant to draw the rafter to its proper place, when the vice principal, without notice or warning, ordered the men at the "crab" to operate it, causing a "crab" rope beneath the timber near which the plaintiff was standing to knock it or pull it off the plate, from which it fell, to the plaintiff's injury; that the plaintiff was not in a position to see or know what was going on, and had no reason to believe the hoist would be ordered at that unusual time: *Held*, sufficient upon the question of negligence. *Beal v. Fiber Co.*, 147.

12. *Contracts — Independent Contractor—Negligence—Unexpected Results.*—When in the hoisting of heavy timbers in the erection of a building a negligent order of a vice principal causes an injury to a servant engaged in the work, without fault on the part of the servant, and it appears that the vice principal knew or should have known that the order would be likely to produce an injury to some of the employees, though the vice principal was not in position to see the servant at the time, the master is not excused from liability for the injury because the result was not exactly what might have been expected. *Ibid.*

13. *Negligence—Master and Servant—Acts of Clerk—Respondeat Superior.*—The plaintiff was employed in the store of A. and was injured by falling through an open trap-door, usually closed and concealed beneath a movable counter. A. had requested the defendant to do some repair work in the basement of the store, and on this occasion a clerk of A., under A.'s instruction, had shown the workman of defendant the way to his work, had opened the trap for him to descend, and was informed by the workman that he would be in the cellar an hour or two. The clerk failed to close the trap or to guard the opening against accidents, and thus the injury complained of was occasioned: *Held*, as A. had the complete control and management of his own store, he was responsible in damages for the negligence of his clerk in not closing or safeguarding the open trap; that this negligence was the proximate cause of the injury, and under the evidence a motion of nonsuit should have been granted. *Howard v. Plumbing Co.*, 224.

14. *Negligence—Joint Tort Feasors—Release as to One—Effect.*—A release of one or more joint tort feasors executed in satisfaction for an injury received from their joint negligent act is a discharge of them all. *Ibid.*

NEGLIGENCE—*Continued.*

15. *Railroads—Fellow-servants—Evidence—Actionable Negligence—Accident.*—Plaintiff in the line of his duty was sawing at one end logs for the defendant, at its lumber plant, which logs were to be placed on defendant's railroad car by appliances run by steam, known as a "skidder" and a "loader." The other ends of the logs were sawed by other of defendant's employees, and the negligence complained of was the failure of these other employees to give plaintiff notice that a log, which rolled upon plaintiff, to his injury, was about to do so. There was no evidence that plaintiff was a part of a train crew or directly engaged in operating the "skidder" or the "loader": *Held,* the Fellow-servant Act, Revisal, sec. 2646, has no application. *Semble,* the injury resulted from an accident, and there was no actionable negligence shown on the part of the defendant. *Twiddy v. Lumber Co.,* 237.

16. *Negligence—Assumption of Risks—Issues—Instructions—Procedure.*—In order for a defendant to make the defense of assumption of risk available to him on the trial, it is necessary for him to tender an issue or ask for an instruction thereon. In this case he has received the benefit of the plea under the issue of contributory negligence. *Harvell v. Lumber Co.,* 224.

17. *Master and Servant—Negligence—Pleadings—Defective Statement—Answer—Aider.*—In an action for damages by a servant for personal injuries alleged to have been caused by the master's negligence, it was alleged in the complaint that the defendant "allowed its passway to become and remain in an unsafe and dangerous condition where the plaintiff and other employees had to pass and repass in the performance of their duties," and that the injury was caused thereby: *Held,* the plea is defective in not stating wherein the passway and platform had become unsafe and dangerous, but it is a defective statement of a cause of action which was aided by answer. *Ibid.*

18. *Master and Servant—Safe Place to Work—Negligence—Evidence.*—A servant having brought his action against his master for damages arising from the latter's alleged negligence in permitting a hole to remain in a passway on a platform where the former was required to work, the defendant's testimony that the hole had been repaired by placing boards over it, and that the injury complained of was caused by plaintiff's stumbling and breaking a board, and that there were thicker boards at defendant's plant, and the one used

NEGLIGENCE—*Continued.*

was not thick enough, is some evidence that the passway was unsafe after the repairs were made. *Ibid.*

19. *Negligence—Proximate Cause—Burden of Proof.*—In an action for damages for an alleged negligent act, it is not sufficient that the plaintiff proves a negligent act of the defendant with reference to the injury; he must further show that the negligence complained of was the proximate cause. *Ibid.*

20. *Negligence—Proximate Cause—Continuing Negligence—Definition.*—Proximate cause is the dominant efficient cause, without which the injury would not have occurred; and if the negligence of the defendant continues up to the time of the injury, and the injury would not have occurred but for such negligence, it is not made remote because some act, not within the control of the defendant, and not amounting to contributory negligence on the part of the plaintiff, concurs in causing the injury. *Ibid.*

21. *Same—Concurring Negligence.*—The fact that the servant stumbled and fell into a hole in a passway where he was required to go in doing his work, and which had been negligently permitted to remain there by the master after notice thereof, does not, in itself, amount to contributory negligence which will bar the recovery of damages by the servant in his action against the master for an injury received in consequence of the master's negligent act. If, however, a negligent act of the servant caused him to stumble and fall into the hole, his negligence would concur with that of the master, and the latter's negligence would not, in a legal sense, be the proximate cause. *Ibid.*

22. *Negligence — Evidence — Inference—Questions for Jury.*—An issue of negligence must be submitted to the jury, and a nonsuit upon plaintiff's evidence should not be granted, when therefrom two minds could reasonably draw different conclusions, one of which would be favorable to the plaintiff. *Ibid.*

23. *Same—Master and Servant—Obvious Danger—Rule of the Prudent Man.*—With respect to his own safety in doing work where it is necessary for him to go on the master's premises, it is the duty of the servant to observe, and he is chargeable with those conditions he could discover by the exercise of ordinary care; but he is not guilty of contributory negligence because he works in the presence of danger, unless it is so obvious that a man of ordinary prudence would have refused to do so. *Ibid.*

NEGLIGENCE—*Continued.*

24. *Same—Evidence—Nonsuit—Questions for Jury.*—In an action for damages by the servant against the master for the latter's alleged negligence in permitting a hole to remain in a passway over a platform at his lumber plant where the plaintiff was required to go in the discharge of his duties, there was evidence on behalf of plaintiff tending to show: that he had some time before informed the defendant of the defect, and it had promised to remedy it; that plaintiff in discharge of his duties was going along the passway with an empty truck, weighing 115 pounds, on his shoulder, groping his way with his right hand along defendant's kiln in the smoke from defendant's kilns, which rendered him unable to see the hole, though he knew it was there; that he would have had to wait about fifteen minutes before the smoke would have cleared away, but had he waited he would have been discharged: *Held*, it was a question for the jury as to whether the plaintiff acted as a man of ordinary prudence, and a motion by defendant to nonsuit upon the evidence was properly denied. *Ibid.*

25. *Negligence—Evidence—Harmless Error.*—As tending to show notice to the master of a negligent defect at a place where the servant was required to go in the discharge of his duties, the plaintiff testified that he told the defendant's foreman thereof, and that the defendant's president said for the foreman to have it fixed; that in reply the foreman bowed his head: *Held*, it was not reversible error for the plaintiff to testify what he understood by the act of the foreman in bowing his head—that it made him think the hole would be fixed—it being germane to the question of plaintiff's contributory negligence in continuing to work in the presence of a known danger; or harmless error at least, the act necessarily indicating an assent. *Ibid.*

26. *Public Inns—Hotels—Guests—Invitation—Negligence.*—A hotel keeper, from the nature of his occupation, extends an invitation to all who come on his premises; and though not an insurer of the guest's personal safety, he is responsible in damages for injuries received by the guest from being placed in an unsafe or unsanitary room. *Patrick v. Springs*, 270.

27. *Railroads—Master and Servant—Employees—Usage—Actionable Negligence—Warning.*—The plaintiff, an employee of defendant railroad, boarded the defendant's train for the purpose of going home from his work, which had been customary: *Held*, it was actionable negligence for the employees of the train to suddenly start the train forward, without

NEGLIGENCE—*Continued.*

notice or warning, while the plaintiff was getting off at his usual place, and thus causing him to be thrown to the ground to his injury. *Roberson v. Lumber Co.*, 328.

28. *Appeal and Error—"Case Settled"—Negligent Killing—Measure of Damages—Net Earnings—Support of Family.*—In an action for damages for the wrongful killing of plaintiff's intestate, it is not error to refuse an instruction which limited recovery to the net earnings, after deducting the cost the deceased would have incurred in supporting his family depending upon him, the object of the statute being to render compensation as near as may be for the actual money value of the life by estimating the present cash value of his probable net earnings above the necessary expenses for his own support. *Ibid.*

29. *Railroads—Negligent Burning—Right of Way—Combustible Material—Causa Causans—Burden of Proof.*—To recover damages of a railroad company for carelessly and negligently communicating fire to its right of way which spread to and burned plaintiff's lands, the burden of proof is on plaintiff to show that defendant negligently permitted combustible matter to accumulate on its right of way and that defendant communicated fire from its engine to its foul right of way and from thence it was communicated to plaintiff's land and caused the injury. *Maguire v. R. R.*, 384.

30. *Railroads — Negligence — Right of Way — Foul Condition — Fire —Duties.*—It is only the duty of a railroad company with respect to its right of way to keep its roadbed and track and a reasonable distance on its right of way clear of such substances as are liable to be ignited by sparks or cinders from its engine. *Ibid.*

31. *Same—Evidence—Nonsuit.*—In an action for damages to plaintiff's land alleged to have been caused by fire communicated to its foul right of way and from thence to plaintiff's land, there was evidence tending to show that when first discovered the fire was burning down the county road, off the right of way, and 100 yards from the railroad; that on the right of way, which had been burned over, from 30 to 50 feet from the track, there were "chunks" smoking as if they had just been burned, with no evidence to indicate the character of the "chunks," or that they constituted combustible material, and nothing to indicate that the fire originated there: *Held*, evidence insufficient, and a judgment of nonsuit upon defendant's motion should have been allowed. *Ibid.*

NEGLIGENCE—*Continued.*

32. *Same—Causa Causans.*—For the plaintiff to recover damages by fire communicated to his land alleged by reason of the foul condition of defendant's right of way, the mere fact that the defendant's engine passed more than two hours before a fire was discovered off the right of way is insufficient evidence to be submitted to the jury upon the question of whether the defendant's engine had caused it, there being no evidence to show that a fire was not there before the engine passed or as to the character and direction of the wind, or that the engine was throwing sparks when it passed. *Ibid.*

33. *Railroads — Negligence—Burning—Evidence—Nonsuit.*—In an action to recover damages for the destruction of plaintiff's residence, alleged to have been caused by fire communicated to the house, which was situated near the defendant's right of way, by sparks from defendant's passing engine, there was evidence tending to show that no fire was within the house which could have caused the damage; that plaintiff and his family, between midnight and 2 o'clock A. M., stood on his front porch and watched the defendant's train pass, and the engine was throwing sparks from its smokestack in great quantities, with the wind blowing from that direction toward the house, which was enveloped by sparks; that soon after plaintiff and his family retired he was awakened by noises which proved to come from his burning house, which was completely destroyed, and that day broke about two hours after the fire was over. There was evidence in defendant's behalf tending to show that its engine was equipped with the best approved type of spark arrester in general use, and that no sparks were emitted from its engine: *Held*, approving the rule that the evidence must be construed in the most favorable light to the plaintiff, when a motion to nonsuit is made, that the plaintiff had made out a *prima facie* case, and was entitled to go to the jury upon the issue as to defendant's negligence. *Kornegay v. R. R.*, 389.

34. *Same—Railroads—Negligence—Burning—Evidence.*—In an action against a railroad company to recover damages for burning the plaintiff's house, alleged to have been negligently caused by sparks from the defendant's engine, the judge correctly instructed the jury, in substance, that if the house caught fire from sparks which were emitted from the engine, it made out a *prima facie* case of negligence, but they would not find against the defendant upon the issue if they concluded, after consideration of all the proof, that the defend-

NEGLIGENCE—*Continued.*

ant's engine had a spark arrester, not the best, but of approved make and in general use, and that the train was carefully handled, so that there was no negligence on the defendant's part. *Ibid.*

35. *Same — Ordinary Work — Instructions — Disobedience—Negligence.*—Where no breach of an arbitrary or independent duty of an employer to his employee is shown, and the former, having the latter to do an ordinary piece of work, gives him instructions concerning it which provide and afford a simple and safe method of doing the work, his instructions may also be considered in reference to his responsibility on the first issue, as to his negligence; and if it is shown that conditions have been changed and work of the kind indicated rendered dangerous by reason of the employee's willful disobedience, that the employer did not approve or encourage, no responsibility should attach to him; and this position, as a rule, is not affected by the view the employee may take of his surroundings. *Flanner v. Cotton Mills*, 394.

36. *Same—Evidence—Instructions.*—The plaintiff was employed by the defendant to dig in a sand pit 13 feet long, 8 feet wide at the top and 8 feet deep. There was evidence for defendant tending to show that there was no danger in digging in the pit if the sides were "flammed" or sloped, and that in violation of instructions the plaintiff continued to dig straight down or undermine the side, and in consequence it caved in on him to his injury: *Held correct*, an instruction tendered by defendant in substance that if they believed the evidence of defendant they should answer the first issue, as to defendant's negligence, "No": and it was error to so modify the instruction as to make their answer to the issue depend upon whether the plaintiff, while in the pit, could see and appreciate his surroundings when digging in disobedience to his instructions. *Ibid.*

37. *Master and Servant—Appliances—Defects—Inspection—Negligence—Damages.*—When there is no equality of knowledge between the employer and employee with respect to simple tools the former furnishes the latter with which to do his work, the employee has the right to assume that the employer has performed his duty in respect to furnishing him the proper one: and this duty the employer may not delegate to another and escape liability for damages caused by its negligence. *Mercer v. R. R.*, 399.

38. *Same—Evidence—Questions for Jury.*—While plaintiff was striking with a sledge hammer a chisel held by defendant's

NEGLIGENCE—*Continued.*

boiler-maker while cutting slack rivets from a boiler, in the course of his employment, a piece of the chisel, under a blow from the hammer, flew off and injured the plaintiff's eye, causing the damage alleged in the action. There was evidence tending to show that it was the duty of the boiler-maker, whom plaintiff was employed to assist, to keep the tools in repair; that plaintiff had been working as his assistant for about a month, and that he handed a chisel to plaintiff to use, which the latter did without opportunity for inspection; that the head of the chisel was too large, and the chisel itself too thin, etc.; that plaintiff struck with the hammer when and as directed by the boiler-maker: *Held*, under the rule, viewing the evidence in its most favorable light for the plaintiff, the question as to defendant's negligence was one for the jury to determine. *Martin v. Mfg. Co.*, 128 N. C., 264, cited and distinguished. *Ibid.*

39. *Railroads — Pedestrians on Track — Danger—"Look and Listen"—Negligence.*—One who walks on a main-line railroad track, in full possession of his faculties, when there are quite a number of lateral tracks in constant use, with walkways between them for the safety of pedestrians, and from his previous experience as an employee of the road he should have known that, at the time, a work train carrying employees to their work customarily passed, owes a duty to keep a lookout for the dangers to himself necessarily attending his action; and when it appears from his own evidence, construed in the light most favorable to him, that the injury complained of was caused by his failure or omission to perform this duty, his negligence will bar his recovery. *Exum v. R. R.*, 408.

40. *Railroads—Pedestrians—Danger—"Look and Listen"—Negligence, Concurrent.*—Where a pedestrian and an engineer of a railroad company are both negligent in failing to keep a proper lookout for danger, and in consequence the pedestrian is run over and killed or injured, the negligence of both is concurrent, and no recovery may be had in an action for damages against the company. *Ibid.*

41. *Negligence—Defective Machinery—Subsequent Defects—Evidence.*—When the defendant has testified, in an action by its employee for damages alleged from the furnishing and use of a defective machine, that the machine had not been changed since the injury and no other injury had been thereby inflicted, it is competent for the plaintiff to show, as evidence of defendant's negligence, that the defect still exists. *Norris v. Mills*, 474.

NEGLIGENCE—*Continued.*

42. *Negligence—Master and Servant—Safe Place to Work—Safe Appliances—Evidence—Assumption of Risks—Questions for Jury.*—The plaintiff was employed to pack lint cotton in defendant's packing-room at its cotton mills as it was blown there with the use of steam fans, the room being 7 feet wide, 14 feet long and 14 feet high. There was evidence tending to show that the door to this room was negligently bolted from the outside, and that through the negligence of the defendant in not keeping the oil cups of the engine in proper repair and in not securely fastening the engine, the lint cotton caught afire while plaintiff was at work, to his damage; that he had to force open the door, as no one heard his calls; that while fire from the ignited cotton covered the room he had to dig down through the cotton to the door, which should have been opened from the inside, and that to get out it was customary to call to employees on the outside; that the machinery had not been inspected during the six months of plaintiff's employment; that another like machine used by defendant did not shake while in operation; and that the fire originated at the bearings of the defective machine, and that lint cotton was on the machinery and connecting pipes. The judge correctly charged upon the questions of *res ipsa loquitur*, of accident, of the duty of the master to furnish his servant a safe place to work, of the master's duty to furnish and inspect the appliances used, and it is *Held*, (1) the evidence is sufficient to go to the jury upon the question of defendant's negligence; (2) that an employee does not assume the risk of an injury caused by the failure of the master to perform a duty imposed on him by law, in furnishing a safe place to work, and this duty cannot be delegated to another so as to exempt the master from liability. *Ibid.*

43. *Railroads—Damages—Fire—Negligence.*—A railroad company is not liable in damages for a fire originating off its right of way caused by a spark from its properly equipped locomotive properly managed by a competent engineer. *Deppe v. R. R.*, 523.

44. *Master and Servant — Contributory Negligence — Evidence — Negligence.*—In an action for damages by one employed by a railroad company as a brakeman, alleged on account of his acting in obedience to instructions in getting on defendant's moving freight train: *Semble*, the evidence relied on to excuse him from contributory negligence, under the rule of the prudent man, would also exonerate the defendant from the charge of negligence. *Wiggins v. R. R.*, 577.

NEGLIGENCE—*Continued.*

45. *Street Railways—Alighting Passengers—Negligence—Questions for Jury—Instructions.*—In an action for damages against a street car company for negligence alleged in suddenly starting the car while plaintiff, a woman of 58 years, seeming to the conductor to be "old and clumsy," was alighting at her destination, of which she had previously notified the conductor, from an ordinary summer car with seats running across and handholds at either end of the seats, the distance from the floor of the car to the running-board being 17 inches and from that to the ground 25 inches, the ground sloping at the place somewhat over 9 inches, an instruction is proper, that if the jury should find, under supporting and conflicting evidence, that if the car was suddenly started and jerked as the plaintiff was alighting with one foot on the running-board and the other in the act of descending to the ground, whereby the plaintiff was thrown to the ground, they should answer the issue of negligence "Yes," but otherwise if the plaintiff fell on the sloping ground after leaving the car. *Morarity v. R. R.*, 586.

46. *Street Railways—Alighting Passengers—Duty of Conductor—Rule of the Prudent Man—Negligence—Questions for Jury.*—As to whether a street-car conductor owes a duty to assist a passenger to alight is a question for the jury, under the rule of the prudent man, with the burden of proof on plaintiff, where such assistance would seem to be required; and defendant's negligence is a question for the jury when there is evidence tending to show that plaintiff was a woman 58 years old, appeared to the conductor to be "old and clumsy," was injured while alighting from a summer car at a customary stopping point, her destination, of which she had previously notified the conductor, and where the ground sloped more than 9 inches. *Ibid.*

47. *Negligence—Evidence—Instructions.*—In this action for damages for personal injuries the usual and appropriate issues of negligence, contributory negligence, and the last clear chance were submitted under evidence tending to show that plaintiff, while walking on defendant's track, became unconscious, and was injured by defendant's train under circumstances in which the engineer could have seen his condition in time to have avoided the injury, and it was held that the instructions given by the court were not erroneous, under *Sawyer's case,* 145 N. C.. 24, and other like cases. *Guilford v. R. R.*, 607.

NET EARNINGS. See Measure of Damages, 9.

NEW TRIAL. See Appeal and Error.

NONRESIDENT. See Parties, 1, 2.

NONSUIT. See Questions for Jury.

1. *Railroads—Damages—Release—Mental Incapacity—Evidence—Conductor—Nonsuit.*—In this case, reported 151 N. C., 231, it was held necessary, to set aside plaintiff's release for damages for personal injuries sought in his action, for plaintiff to prove that defendant had notice of his mental incapacity at the time. The evidence on this appeal, in addition to that on the former appeal, tends to show that certain letters indicating his mental soundness, though signed by plaintiff, were written with the aid of his wife and others in view of having him continued in his occupation as defendant's conductor, but this fact was withheld from defendant; there was also evidence tending to show that defendant knew of plaintiff's nervous condition, rendering him incapable of running as conductor, eight months before he signed the release. The amount paid for plaintiff's release was about 94 per cent of the amount of his original demand for damages: *Held*, insufficient to go to the jury on the issue, and defendant's motion for judgment of nonsuit should have been granted. *West v. R. R.*, 24.

2. *Nonsuit—Evidence, How Considered.*—Where a motion to nonsuit is made under the statute, the evidence must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found those facts from the testimony. *West v. Tanning Co.*, 44.

3. *Instructions—Nonsuit—Evidence, How Considered.*—Asking a special instruction that "upon all the evidence, if believed, the plaintiff was guilty of contributory negligence as a matter of law, and the jury will answer" the issue in defendant's favor, is equivalent to asking the direction of a nonsuit, and the evidence will be viewed on appeal in the light most favorable for the plaintiff. *Lane v. R. R.*, 91.

4. *Deeds in Trust—Sale—Partnership—Principal and Agent—Dower—Fraud—Evidence—Nonsuit.*—A partnership of three duly executed, with their wives, a deed of trust to F. upon their separate lands to secure a partnership debt, which was foreclosed to pay the debt under its terms and conditions. The lands were bid in by the mortgage creditors, and by them conveyed to one of the firm for the amount of the debt,

NONSUIT—*Continued.*

taking a deed in trust to secure the purchase price. This action is brought by the wife of one of the partners to set aside the conveyances on the ground that the other partners were her agents and acted in fraud of her rights: *Held*, (1) the plaintiff, having duly executed the mortgage to the partnership, conveyed her inchoate right of dower and the purchaser obtained a good and indefeasible title, whether she had paid a part or all of the purchase money for the land embraced in the mortgage, there being no evidence that the sale was not fairly and honestly conducted, or that the terms of the trust deed were not complied with; (2) it appearing that the plaintiff had full knowledge of the advertisement of the land for sale, with full opportunity to pay the debt or redeem beforehand and before the deed was made to the purchaser, and there being no evidence of fraud, a motion to nonsuit should have been allowed. *Wilson v. Mills*, 105.

5. *Evidence — Nonsuit — Defendant's Evidence.*—Evidence introduced by defendant cannot be considered for him on his motion to nonsuit the plaintiff upon the evidence, and it was reversible error for the trial judge to permit defendant to introduce a deed pertinent to the inquiry during the taking of plaintiff's testimony and consider it in granting defendant's motion. *Boddie v. Bond*, 359.

6. *Railroads—Negligence—Right of Way—Evidence—Nonsuit.*—In an action for damages to plaintiff's land alleged to have been caused by fire communicated to its foul right of way and from thence to plaintiff's land, there was evidence tending to show that when first discovered the fire was burning down the county road, off the right of way, and 100 yards from the railroad; that on the right of way, which had been burned over, from 30 to 50 feet from the track, there were "chunks" smoking as if they had just been burned, with no evidence to indicate the character of the "chunks," or that they constituted combustible material, and nothing to indicate that the fire originated there: *Held*, evidence insufficient, and a judgment of nonsuit upon defendant's motion should have been allowed. *Maguire v. R. R.*, 384.

7. *Evidence—Conjecture—Nonsuit.*—When the evidence raises no more than a mere conjecture as to defendant's negligence, it is error to submit the case to the jury. *Ibid.*

8. *Railroads—Pedestrians—Danger—"Look and Listen"—Duty of Engineer—Duty of Pedestrian—Avoidance of Injury—Nonsuit.*—The plaintiff's intestate, a sound man, with no ap-

NONSUIT—*Continued.*

parent infirmity, and an employee of defendant railroad company, was walking along the main-line track going to his work, at the time a train provided for the purpose of taking him and other employees to their work customarily passed. At this place there were many lateral tracks, having walkways between them for pedestrians, upon which trains were constantly passing. The employees' train, going in the same direction as plaintiff's intestate, overtook and killed him as he was walking briskly along on the track. A witness testified that he saw intestate's danger, and in view of the plaintiff and defendant's engineer ran from 20 to 30 feet in direction of intestate, waving his hands and shouting to warn the intestate of his danger, but did not attract the attention of any one: *Held,* (1) it was equally incumbent upon the intestate as well as the engineer to keep a sharp lookout, and the latter had the right to assume, had he seen the signals, that the intestate would see and hear the warnings of the witness, and would step off the track at the last moment and avoid the injury; (2) judgment of nonsuit upon the evidence was properly sustained. *Exum v. R. R.*, 408.

NOTARY PUBLIC. See Contracts, 13.

NOTES. See Husband and Wife, 7; Usury, 2, 3.

NOTICE. See Deeds and Conveyances, 4, 5, 22; Negligence, 1; Telegraphs, 2, 3; Bankruptcy, 5, 8, 9, 10.

NUISANCE.

Cities and Towns—Ordinance—Nuisance—Alleyway—Access to Property—Procedure.—The defendant town, by an ordinance criminal in its nature, declared plaintiff's alleyway a nuisance and dangerous to the public, and closed it up. Plaintiff brings his action for damages and mandamus and injunction, on the ground that he had been deprived of access to his property: *Held,* the action was not to enjoin the enforcement of the criminal law, but to determine and enforce plaintiff's property rights, leaving open to the defendant the right to prosecute him under the ordinance. *Crawford v. Marion*, 73.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 6; Reference, 4, 6, 7.

1. *Witnesses—Privileged Communication—Responsive Answers—Objections and Exceptions.*—It is the province of counsel to object to irrelevant matter, and a responsive answer by a witness to a question of a defamatory nature, when no ob-

OBJECTIONS AND EXCEPTIONS—*Continued.*

jection is made, or, being made, is overruled, cannot make the witness liable in an action for damages. *Baggett v. Grady*, 342.

2. *Evidence—Objections and Exceptions.*—A general objection to evidence which is partly competent cannot be sustained; the objection should specify the grounds thereof and be confined to the incompetent evidence. *Rollins v. Wicker*, 559.

OBSTRUCTION. See Waters and Water Courses, 1, 2; Highways, 3.

OFFICER. See Pleadings, 9, 10.

OFFICE HOURS. See Telegraphs, 1, 2.

OFFSET. See Contracts, 24, 53.

OPTION. See Deeds and Conveyances, 21.

ORDINANCE. See Cities and Towns, 3, 16, 22.

OUSTER. See Jurisdiction, 4.

OWNERSHIP OF TREES. See Deeds and Conveyances, 48.

OYSTER BEDS. See State's Lands, 1.

PAROL AGREEMENT. See Contracts.

PAROL EVIDENCE. See Evidence.

PAROL TRUST. See Trusts and Trustees, 1, 2, 3, 4, 5, 6, 7.

PARTIES. See Estoppel, 2; Executors and Administrators, 2; Injunction, 7; Usury, 1, 8.

1. *Parties — Nonresident Plaintiff — Right of Action — Courts—Jurisdiction.*—A nonresident plaintiff may maintain his action in our courts, and he may recover for work done in constructing a railroad situated in this State, and establish his lien on the roadway so constructed, and bring an attachment thereon. U. S. Constitution, Art. IV, sec. 2; Revisal, sec. 440. *McDonald v. MacArthur*, 122.

2. *Courts — Jurisdiction — Foreign Contracts—Parties—Foreign Defendants—Cause of Action Here.*—When an action is brought by a nonresident plaintiff for breach of a written contract signed in another State, the written contract is not the cause of action, but breach in the performance thereof here, and the plaintiff may maintain his action, as the cause thereof arose in this State. Revisal, sec. 440. *Ibid.*

3. *Associations — Churches — Powers—Trustees—Appointment—Parties—Court's Discretion.*—At a meeting regularly held by

PARTIES—*Continued.*

a voluntary association of churches, trustees were appointed for a school chartered by the association. At the same time, but at a different place, there was a meeting called by the officers of the association, when and where other and conflicting trustees were appointed. The question at issue being which set of trustees were the ones legally qualified to act, it was *Held*, (1) that the trustees appointed at these meetings were the real parties in interest, and it was not error for the trial judge in his discretion to order them to be made parties, so that the matter might be decided upon its merits (Revisal, 507); (2) no appeal lies from the refusal of a motion to dismiss, and an entry of appeal not perfected is treated as an exception on appeal from the final judgment. *Kerr v. Hicks*, 265.

4. *Parties — Interest — Oyster Beds—Vacate Grants—Attorney-General—Authorization.*—One who has no interest in the lands, other than that of a citizen of the State, cannot maintain an action to vacate a grant to an oyster bed (Revisal, 1748, 1750), and under such circumstances the Attorney-General is the only one who may maintain the action, it being his duty alone to look out for the interests of the State in such matters; and his authorization to another to bring the action is insufficient. Cases of *quo warranto* distinguished. *Jones v. Riggs*, 281.

5. *Taxation—Enforcement—Executors and Administrators—Parties—Procedure—Priorities.*—It is the duty of an executor or administrator to pay the taxes of deceased out of the trust funds in his hands, and the statute prescribes that "such liability may be enforced by an action against him in the name of the sheriff," Revisal, sec. 2862, giving certain priorities prescribed by Revisal, sec. 89. *Sherrod v. Dawson*, 525.

PARTITION.

1. *Estoppel—Partition—Judgment—Adjoining Owners—Identity—Issues—Mutuality.*—In partition proceedings between the heirs at law of the deceased, the dividing lines between the *locus in quo* and adjoining owners not being involved and the question involved being only what was a fair division of the lands between the parties, the judgment therein does not estop one of the petitioners to show his true line between his portion and an adjoining owner, not a party to the proceedings, as the identity of that line was not therein involved, and there was no mutuality upon which the application of the doctrine of estoppel could be founded. *Gillam v. Edmonson*, 127.

PARTITION—*Continued.*

2. *Same — Petitioner — Lands Afterwards Acquired—Title—Different Right.*—A judgment in partition proceedings fixing only the divisional boundaries of the *locus in quo* between the heirs at law does not estop the heirs at law from showing the true dividing line between their land and an adjoining tract, nor does it estop one of them, who has afterwards acquired the lands of an adjoining owner to the portion allotted to another of the heirs, from showing the true boundary line of his purchase, as he holds the lands so acquired under the title of his vendor, who was not a party to the partition proceedings, and in such case there could be no mutuality of estoppel upon which its application could be made. (*Carter v. White*, 134 N. C., 469, cited and distinguished.) *Ibid.*

3. *Husband and Wife — Tenants in Common — Partition — Evidence.*—When lands are purchased by the husband, and under his instruction are conveyed to him and his wife, jointly, by deed of bargain and sale, with full covenants of warranty, the doctrine of survivorship is not affected by the fact that the lands so purchased were a part of lands conveyed by his father, W., to a guardian for the benefit of the children of W., there being no evidence upon the face of the deed to the husband that it was made in pursuance of a scheme to divide lands held in common among the children of W. *Harrington v. Rawls*, 131 N. C., 40; 136 N. C., 65, and *Sprinkle v. Spainhour*, 149 N. C., 224, cited and distinguished. *Morton v. Lumber Co.*, 278.

PARTNERSHIP.

1. *Deeds in Trust — Sale — Partnership—Principal and Agent—Dower—Fraud—Evidence—Nonsuit.*—A partnership of three duly executed, with their wives, a deed of trust to F. upon their separate lands to secure a partnership debt, which was foreclosed to pay the debt under its terms and conditions. The lands were bid in by the mortgage creditors, and by them conveyed to one of the firm for the amount of the debt, taking a deed in trust to secure the purchase price. This action is brought by the wife of one of the partners to set aside the conveyances on the ground that the other partners were her agents and acted in fraud of her rights: *Held*, (1) the plaintiff, having duly executed the mortgage to the partnership, conveyed her inchoate right of dower and the purchaser obtained a good and indefeasible title, whether she had paid a part or all of the purchase money for the land embraced in the mortgage, there being no evidence that the

PARTNERSHIP—*Continued.*

sale was not fairly and honestly conducted, or that the terms of the trust deed were not complied with; (2) it appearing that the plaintiff had full knowledge of the advertisement of the land for sale, with full opportunity to pay the debt or redeem beforehand and before the deed was made to the purchaser, and there being no evidence of fraud, a motion to nonsuit should have been allowed. *Wilson v. Mills*, 106.

2. *Usury—Contracts—Partnership—Test.*—When money is loaned to purchase standing timber and to be repaid at a certain rate per thousand feet when the timber is sawed, not less than a fixed sum per month, there is no partnership arrangement between the borrower and the lender, so as to take the matter from the operation or purview of the law against usury. *Riley v. Sears*, 509.

3. *Same.*—The obligation to repay a loan of money borrowed to undertake an enterprise which is not made dependent on the risks to be incurred or upon whether the venture or enterprise succeeds or fails, with a stipulation in the contract for its repayment in any event at a rate of interest exceeding that allowed by law, is usurious, and not a partnership contract. *Ibid.*

4. *Same—Substitution—Accounting.*—A partnership, T. & Co., having borrowed money to be invested in standing timber, to be repaid at a certain rate per thousand feet of lumber cut therefrom, under an agreement held to be usurious, dissolved by the retirement of T., and S., the company of the firm, formed a partnership with a third person under the name of S. & Co., which soon thereafter became incorporated. Some ninety days before the time provided for the beginning of the various payments upon the loan agreed upon under the contract of T. & Co., the corporation, with the creditor's consent, cut lumber and paid off the debt, except that created by the usurious part of the contract. The corporation and the creditor, by a written agreement, entered into an accounting together and determined upon the amount due the latter under the contract: *Held*, by the consent of all the parties the corporation was substituted as successor to the original parties, and the usury affecting the original transaction was not effaced or removed; (2) the agreement under which the accounting was had was with reference to and in acknowledgment of the original contract. *Ibid.*

PASSENGERS. See Railroads, 27, 28.

PATENTS. See Contracts, 44.

PAVING STREETS. See Cities and Towns, 1, 2.

PAYMENT. See Debt, 1, 3, 4, 5; Deeds and Conveyances, 53; Principal and Surety, 1, 2; Insurance, 4, 8; Judgment, 2.

PEDESTRIANS. See Railroads, 16, 17, 18, 19.

PENALTY STATUTES. See Statutes.

1. *Spirituous Liquors — Penalty Statutes — Construction.*— The statute prohibiting the sale of spirituous, etc., liquors is a penal one, strictly to be construed, and the meaning of the words employed of "precise legal import, both at law and in equity," will not be extended to include an unexpressed but presumed intention of the Legislature. *S. v. Colonial Club,* 177.

2. *Same—"Sale"—Intent.*—The words "sale" or "sell," used in the general prohibition law, have a well-known legal signification, and in the absence of anything to the contrary appearing in the statute, that signification is assumed to be the one intended. *Ibid.*

3. *Same—Consideration.*—In order to constitute a sale within the meaning of the general prohibition law, there must be a transfer upon a valuable consideration of the absolute or general property in the spirituous liquor alleged to have been sold contrary to law. *Ibid.*

4. *Same—Interpretation of Statutes—Gratuitous Bailee—Commingling of Goods—Principal and Agent—Special Verdict—Intent.*—Upon the trial of the defendant club for the sale of spirituous liquor contrary to the general prohibition law, it appears by special verdict that, under an existing arrangement for all members, one of its members made an order for beer in bottles on a dealer beyond the State, directing that it be shipped to him in care of the defendant, handing the steward of the club the amount of the order in money, and which the club remitted the dealer by its check on its bank account. The beer was received by the manager of the club and commingled with the bottled beer of other members, and furnished to the member according to a general system of checking used by the club, until the number of bottles ordered was gone. The club did not solicit these orders: *Held,* (1) under this arrangement the title to the beer did not vest in the club; (2) ordering the beer from beyond the State was not an illegal act, the club acting as the agent of the member and the title to the beer did not vest in the club (Revisal, sec. 3534); (3) the club rendering the service without compensation, was a gratuitous bailee,

PENALTY STATUTES—*Continued.*

having only a qualified interest, and the fact that the bottles of beer of one member were commingled with those of the others kept by the club as such, did not render the transaction a sale; (4) the facts in this case did not constitute the club the agent of the vendor in another State; (5) as the special verdict did not find the intent, its existence may not be presumed by the court. *Ibid.*

5. *Penalty Statutes—Violation—Amount—Legislative Discretion.* The penalty prescribed by Revisal, sec. 3956, relating to sales of fertilizers, is a matter resting within the legislative discretion, and is prescribed as a punishment to enforce the execution of the law, in addition to compensation recoverable for the damages sustained. *Carson v. Bunting*, 530.

6. *Penalty Statutes—Judicial Notice—Pleadings—Proof.*—Section 3956 of the Revisal imposes a penalty for the violation of the law by those selling fertilizers, for protection to the farmers in their use, and, being a public statute, the courts will take judicial knowledge thereof and permit a recovery thereunder, though not specially pleaded, when there is allegation and proof that section 3957, relating to the sale of cotton-seed meal as a fertilizer, has been violated. *Ibid.*

7. *Same—Cotton-seed Meal.*—When there is allegation and proof that one selling to the user cotton-seed meal as a fertilizer has failed to show, by branding on the bags or tags attached, the amount of ammonia or nitrogen, or the name of the manufacturer, as required by Revisal, sec. 3957, the penalty prescribed by section 3956 is recoverable, though this section be not pleaded. The demand for relief is immaterial, and a judgment should be rendered as justified by the pleadings and proof. *Ibid.*

8. *Same—Relief Demanded.*—Upon allegation and proof that defendant has sold plaintiff cotton-seed meal to be used by the latter as fertilizer, without branding or tagging the bags as required by Revisal, sec. 3957, the fact that the plaintiff demands relief under section 3960 does not prevent his recovery of the penalty prescribed by section 3956. *Ibid.*

9. *Fertilizers—Public Benefit—Interpretation of Statutes.*—The purpose of Revisal, sec. 3945 *et seq.*, is to protect the public from the sale of worthless fertilizers, subjecting those violating it to a penalty, section 3956, and making the offense a misdemeanor. Revisal, 3814, 3822. *S. v. Oil Co.*, 635.

10. *Same—Indictment—Evidence—Conviction.*—The defendant was tried for selling cotton-seed meal for fertilizer in violation

PENALTY STATUTES—*Continued.*

of Revisal, 3957, under an indictment which followed the language of the statute, and the evidence showed that the defendant sold the meal in sacks upon which there were no tags or other indication of the weight of the sacks or the chemical composition of their contents, or other data respecting them, as required by the statute: *Held*, the indictment sufficient in form and the evidence fully justified a conviction; and the fact that the purchaser exchanged cotton seed for the meal was not material. *Ibid.*

11. *Fertilizers — Tags — Data — Ingredients—Public Benefit—Defense—Interpretation of Statutes.*—A letter from the State Agricultural Department advising defendant that it would not be necessary to stamp the name and address of the manufactory on the back of the tax receipt is irrelevant as a defense in an action for violating Revisal, sec. 3957, by selling cotton-seed meal for fertilizer without tagging or showing the data required by the statute, which would indicate the weight and chemical composition of the contents of the sacks, etc. *Ibid.*

12. *Same—Qui Tam Actions—Constitutional Law.*—It is not unconstitutional for the Legislature to make an act a misdemeanor and also impose a penalty therefor to be recovered in a *qui tam* action, and Revisal, 3814, 3822, and 3956, making it a misdemeanor and imposing a penalty for the violation of the fertilizer laws, to be given in part to the one who shall sue for and recover the same, are constitutional and valid. *Ibid.*

PEONAGE. See Constitutional Law, 15.

PERFORM, FAILURE TO. See Contracts, 43, 44, 45.

PERMIT. See Cities and Towns, 21, 22.

PHYSICIAN. See Damages, 4.

PLEADINGS. See Usury, 1, 9.

1. *Equity—Contracts—Specific Performance—Pleadings—Prayers for Relief.*—In a suit for specific performance brought by the vendor, the measure of the kind of relief a court of equity will grant is not necessarily determined or controlled by the relief demanded in the complaint, but by the facts set out in the pleadings. *Councill v. Bailey*, 54.

2. *Same—Measure of Relief.*—Plaintiff in an action against the vendee alleged in his complaint that the latter had entered into a written contract with him for the purchase of certain lands, and he had tendered him a good and sufficient deed in

PLEADINGS—*Continued.*

accordance with the terms and conditions of his contract to convey, and prayed for a judgment for the purchase money, adding a general prayer "for such other and further relief to which he may be entitled": *Held,* sufficient to warrant a judgment for a specific performance of the contract in every respect, including a declaration of a vendor's lien upon the land and a direction for a sale thereof to satisfy the debt. *Ibid.*

3. *Practice — Jurisdiction — Demurrer — Pleadings—Waiver.*—A plea to the jurisdiction of the court over the parties and subject-matter of an action, or that the complaint does not state a cause of action, is not waived by filing an answer, as such may be made at any time, even in the Supreme Court, *ore tenus. McDonald v. MacArthur,* 122.

4. *Master and Servant—Negligence—Pleadings—Defective Statement—Answer—Aider.*—In an action for damages by a servant for personal injuries alleged to have been caused by the master's negligence, it was alleged in the complaint that the defendant "allowed its passway to become and remain in an unsafe and dangerous condition where the plaintiff and other employees had to pass and repass in the performance of their duties," and that the injury was caused thereby: *Held,* the plea is defective in not stating wherein the passway and platform had become unsafe and dangerous, but it is a defective statement of a cause of action which was aided by answer. *Harvell v. Lumber Co.,* 254.

5. *Corporations — Insolvency — Receivers — Pleadings — Relief Granted.*—It appears in this case from the facts alleged in, and the general scope of, the complaint, that the relief should not be restricted to the exact prayer of the complaint, but should be extended so as to afford relief which is commensurate with the averments, under the familiar rule that it is not the language of the prayer, but the allegations of the pleading that determine the extent of the relief to be granted. *Silk Co. v. Spinning Co.,* 421.

6. *Pleadings—Demurrer—Common Law—Presumptions—Burden of Proof.*—When a cause of action, sued on and recognized here, arose in another State, a demurrer to the complaint is bad which is based on the defense that, according to the laws of such other State, no cause of action is alleged. Such defense must be set up in the answer, with burden of proof on defendant. *Miller v. R. R.,* 441.

7. *Leases—Covenant—Trespasser—Pleadings—Inconsistent Pleas—Election—Procedure.*—The plaintiff leased a hotel equipped

PLEADINGS—*Continued.*

with baths, closets, etc., working with sewerage connections in a city having a sewerage system, and, having entered into possession, found that the sewer connected with the hotel was a private one traversing the lands of an adjoining owner. In an action against his lessor and the adjoining owner he alleged, as to the former, a breach of an implied covenant of quiet enjoyment, and that the latter maliciously, wantonly, and wrongfully stopped up the sewer pipe, to his damage, etc. The cause of action as to both defendants being damages arising from stopping the sewer: *Held,* (1) the wrongful acts alleged as against the adjoining owner were those of trespass or wrongdoing, and inconsistent with the allegations of breach of covenant on the part of the lessor; (2) the action was remanded to the Superior Court so that the plaintiff may elect the cause of action he will prosecute, and amend his complaint accordingly. *Huggins v. Waters,* 443.

8. *Pleadings—Demurrer—Allegations Construed.*—Upon demurrer to a complaint the allegations in the latter pleadings are to be accepted by the court as true, and if any portion of it, to any extent, states a cause of action, or a cause of action can be fairly gathered from it, the demurrer will be held as bad; for under our Code system of pleading the allegations must be liberally construed in favor of the one pleading them, to the end that substantial justice be done. *Brewer v. Wynne,* 467.

9. *Same—Officers.*—When the complaint in an action for damages for unlawful arrest alleges the wrongful acts to be committed by defendants, as individuals, and not in their capacity as officers of a municipal corporation, a demurrer is held as bad which is based upon the position that the defendants were not acting in their individual capacity, but as officers of an incorporated city. *Ibid.*

10. *Same.*—A complaint states a cause of action which alleges damages for an unlawful arrest and assault by defendants without warrant or lawful complaint, and a demurrer is bad which is based upon the defense that defendants were acting as officers of an incorporated city, when the complaint alleges their acts as individual ones. *Ibid.*

11. *Penalty Statutes—Judicial Notice—Pleadings—Proof.*—Section 3956 of the Revisal imposes a penalty for the violation of the law by those selling fertilizers, for protection to the farmers in their use, and, being a public statute, the courts will take judicial knowledge thereof and permit a recovery thereunder, though not specially pleaded, when there is alle-

PLEADINGS—*Continued.*

gation and proof that section 3957, relating to the sale of cotton-seed meal as a fertilizer, has been violated. *Carson v. Bunting,* 530.

12. *Same—Cotton-seed Meal.*—When there is allegation and proof that one selling to the user cotton-seed meal as a fertilizer has failed to show, by branding on the bags or tags attached, the amount of ammonia or nitrogen, or the name of the manufacturer, as required by Revisal, sec. 3957, the penalty prescribed by section 3956 is recoverable, though this section be not pleaded. The demand for relief is immaterial, and a judgment should be rendered as justified by the pleadings and proof. *Ibid.*

13. *Same—Relief Demanded.*—Upon allegation and proof that defendant has sold plaintiff cotton-seed meal to be used by the latter as fertilizer, without branding or tagging the bags as required by Revisal, sec. 3957, the fact that the plaintiff demands relief under section 3960 does not prevent his recovery of the penalty prescribed by section 3956. *Ibid.*

POLICIES. See Insurance, 3, 4, 5, 6, 7, 8.

POSSESSION. See Estates, 11; Liens, 3; Trespass, 1.

POWER OF COURTS. See Courts.

POWERS. See Deeds and Conveyances, 1, 3, 4; Religious Societies, 1, 3.

PRACTICE. See Injunction, 6; Ejectment, 1.

PRECEDENCE. See Decisions, 1.

PREFERENCE. See Bankruptcy, 4, 5, 6, 7, 8, 9, 10.

PREFERRED STOCK. See Corporations, 1.

PRESUMPTION. See Instructions, 5; Pleadings, 6; Evidence, 50; Estates, 10.

PRINCIPAL AND AGENT. See Deeds and Conveyances, 1, 2, 3, 4, 5; Mortgage, 7; Partnership, 1.

1. *Equitable Liens — Acts of Possession — Consent—Creditors—Registration—Principal and Agent.*—The factor and defendant manufacturing company contracted that the former would advance to the latter three-fourths of the net cash value of the manufactured goods on hand and stored with it, being the value thereof after deducting freights, commissions, etc., the goods to be billed up to the factor and stored

PRINCIPAL AND AGENT—*Continued.*

in separate warehouses according to the factor's custom, and insured in his favor. A receiver was appointed for the defendant, but prior thereto, under the arrangement stated, the defendant became indebted to the factor, and the agent of the latter visited defendant's mills in company with its president and other officers, took an inventory of the manufactured goods stored in the basement and warehouse, numbered by bales, pieces, and yards, stated that he took possession for his principal, the factor, and left it in charge of C., as the latter's agent: *Held,* (1) independently of the law regulating factors' liens, this constituted an assertion of control, and a taking of possession, reducing the pledge to the possession of the pledgee before the rights of the creditors under the receivership attached; (2) the undisputed evidence showing that C. had previously left the employment of the defendant, his possession was that of the pledgee; (3) therefore, to enforce the equitable lien against creditors, registration was unnecessary; (4) the factor having the right of possession under the contract, the assent of defendant's officers to his taking possession was unnecessary. *Garrison v. Vermont Mills,* 1.

2. *Spirituous Liquors—Penalty Statutes—Interpretation of Statutes—Gratuitous Bailee—Commingling of Goods—Principal and Agent—Special Verdict—Intent.*—Upon the trial of defendant club for the sale of spirituous liquor contrary to the general prohibition law, it appears by special verdict that, under an existing arrangement for all members, one of its members made an order for beer in bottles on a dealer beyond the State, directing that it be shipped to him in care of the defendant, handing the steward of the club the amount of the order in money, and which the club remitted the dealer by its check on its bank account. The beer was received by the manager of the club and commingled with the bottled beer of other members, and furnished to the member according to a general system of checking used by the club, until the number of bottles ordered was gone. The club did not solicit these orders: *Held,* (1) under this arrangement the title to the beer did not vest in the club; (2) ordering the beer from beyond the State was not an illegal act, the club acting as the agent of the member and the title to the beer did not vest in the club (Revisal, sec. 3534); (3) the club rendering the service without compensation, was a gratuitous bailee, having only a qualified interest, and the fact that the bottles of beer of one member were commingled with those of the others kept by the club as such, did not render the

PRINCIPAL AND AGENT—*Continued.*

transaction a sale; (4) the facts in this case did not constitute the club the agent of the vendor in another State; (5) as the special verdict did not find the intent, its existence may not be presumed by the court. *S. v. Colonial Club*, 177.

3. *Deeds and Conveyances—Legal Title—Principal and Agent.*—S., at the request of K., purchased certain lands for him, paid the purchase price and had the deed made to himself, and from the admissions in the pleadings it appears that it was done under a parol agreement that he was to convey to K. upon the repayment by the latter of the purchase price and interest. The statute of frauds was not pleaded: *Held*, (1) under the admissions in the pleadings, equity will regard the deed to S. in the nature of a mortgage to secure the repayment of the purchase price of the land; (2) the purchase of the land by K. through S. was in effect as if K. had made the purchase himself; (3) it was not necessary to the equity of K. that he should have held the legal title; (4) the effect of the transaction was governed by the agreement between S. and K. without regard to what the vendor may have understood. *Sandlin v. Kearney*, 596.

PRINCIPAL AND SURETY.

1. *Mortgages—Principal and Surety—Payment by Surety—Assignment of Mortgage — Debtor and Creditor — Security.*—When the surety pays a note of his principal, and has the note and a mortgage securing it transferred directly to himself, he becomes a simple contract creditor of the principal and the owner of the mortgage to secure the payment of the debt. This case is distinguished from those wherein a judgment has been obtained against the principal and surety, or where there is a mortgage and the rights of third persons as creditors or purchasers have intervened. *Tripp v. Harris*, 296.

2. *Same—Landlord and Tenant—Liens—Priority.*—The plaintiff, a landlord, became surety on his tenant's note and joined with him in a mortgage of the former's personal property and on the crops to be raised by the tenant during that crop year. He also made advances to the tenant to enable him to make the crop. The tenant, the defendant, failed to pay the note and his landlord paid it, as surety, and had the note and mortgage assigned to himself: *Held*, the effect of the plaintiff's executing the mortgage was to relinquish his landlord's lien on the crop in favor of the mortgagee, and not to surrender his rights against the tenant; and having paid the note, he could first apply the proceeds of the sale

PRINCIPAL AND SURETY—*Continued.*

of the crop to the satisfaction of his superior lien as landlord, against the will of the tenant, the defendant. *Lee v. Manley, ante,* 244, cited and distinguished. *Ibid.*

PRIORITIES. See Liens.

PRIVIES. See Estoppel, 2.

PRIVILEGED COMMUNICATIONS. See Attorneys, 1, 2, 3.

PRIVY EXAMINATION. See Deeds and Conveyances, 27.

PROCEDURE. See Assumption of Risks, 2; Executors and Administrators, 2; Habeas Corpus, 1, 2, 3.

1. *Cities and Towns — Streets — Adjoining Owner—Access—Injunction—Damages—Procedure.*—The right of ingress and egress over one's own land to and from a public street is an incident to ownership and constitutes a property right; and an injunction will lie against a town to prevent its depriving an abutting owner to a street of access to his land, and may be joined in the same action with demand for damages. *Crawford v. Marion,* 73.

2. *Cities and Towns—Streets—Adjoining Owner—Access—Procedure.*—It appears in this case that the plaintiff has been provided with a temporary entrance to his land, and a temporary order restraining the defendant from closing the one complained of is unnecessary and will not be granted. If it should be finally determined that the alleyway, the subject of the action, is dangerous to the public, or a nuisance, the court will consider the best means of abating or remedying it. *Ibid.*

3. *Reference Agreed—Power of Court—Procedure.*—The court cannot set aside the method of trial agreed upon by the parties to a consent reference. *Rogers v. Lumber Co.,* 108.

4. *Appeal and Error—Instructions—Entire Record—New Trial—Procedure.*—When the charge of the trial court is erroneous in respect to that part excepted to by the defendant, and the entire evidence relative to the inquiry is before the court, from which it is perfectly apparent that in no aspect of it is there any defense available, a new trial will not be granted. *Bateman v. Lumber Co.,* 248.

5. *Same — Exceptions — Appeal and Error — Procedure.* — The amendment making additional parties does not affect the decision in this case, as thereby the subject of the controversy was not changed, the additional parties being the beneficiaries for whom this action was brought, and proper parties

PROCEDURE—*Continued.*

(Revisal, 400); and if it be conceded that the solicitor was an unnecessary party, that is not ground for an exception. *Kerr v. Hicks*, 265.

6. *Same — Foreclosure — Procedure—Rights of Assignee.*—Under an assignment by the mortgagee of the deed, insufficient to pass the legal title, the assignee acquires only the mortgage debt and the right by proper legal proceedings to subject the lands to its payment. *Morton v. Lumber Co.*, 336.

7. *Foreign Corporations—Insolvency—Receivers—Property Here—Procedure.*—An insolvent corporation, with its property or plant located in this State, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another State, approving *Holshouser v. Copper Co.*, 138 N. C., 248. *Silk Co. v. Spinning Co.*, 421.

8. *Same—Pleadings—Inconsistent Pleas—Election—Procedure.*—The plaintiff leased a hotel equipped with baths, closets, etc., working with sewerage connections in a city having a sewerage system, and, having entered into possession, found that the sewer connected with the hotel was a private one traversing the lands of an adjoining owner. In an action against his lessor and the adjoining owner he alleged, as to the former, a breach of an implied covenant of quiet enjoyment, and that the latter maliciously, wantonly, and wrongfully stopped up the sewer pipe, to his damage, etc. The cause of action as to both defendants being damages arising from stopping the sewer: *Held*, (1) the wrongful acts alleged as against the adjoining owner were those of trespass or wrongdoing, and inconsistent with the allegations of breach of covenant on the part of the lessor; (2) the action was remanded to the Superior Court so that the plaintiff may elect the cause of action he will prosecute, and amend his complaint accordingly. *Huggins v. Waters*, 443.

9. *Appeal and Error—Reference—Remand—Rereference—Procedure.*—Upon appeal in this case the Court so decidedly departed from the basis of accounting adopted by the referee that it is directed that it be remanded to him with directions to restate the account and revise his findings of fact, hearing further testimony if he considers it desirable to do so. *Tart v. Tart*, 502.

10. *Counties — Taxation—Conflicting Demands—Injunction—Parties—Misjoinder—Removal of Causes—Discretion of Court—Procedure.*—This action involves a controversy between two

PROCEDURE—*Continued.*

counties as to which is entitled to assess taxes upon the same personal property, consisting of solvent credits. The sheriff of one county seized the property in the hands of an administrator as that of a deceased resident, and the sheriff of the other claims it as that of one of its citizens to whom the deceased is alleged to have duly assigned it before June 1. The administrator of deceased and the alleged assignee seek to enjoin the sheriffs of both counties from selling the property for taxes, offering to pay into court the taxes on the larger amount assessed: *Held*, (1) the main relief is that by injunction, and the injunction should be continued; (2) the pleadings relate to one transaction, and there is no misjoinder of parties; (3) the plaintiffs could elect to sue in either county; (4) the question of the removal of the action in effect involved the contest of the two counties over a fund and within the discretion of the trial judge; (5) the right of either county to the tax depended upon the place of residence of the true owner, a question of fact for the jury under conflicting evidence; (6) the plaintiffs should not be required to pay the tax and sue the respective counties to recover it back; (7) the remedy by injunction is the proper one. Revisal, secs. 821, 2855. *Sherrod v. Dawson*, 525.

11. *Taxation—Enforcement—Executors and Administrators—Parties—Procedure—Priorities.*—It is the duty of an executor or administrator to pay the taxes of deceased out of the trust funds in his hands, and the statute prescribes that "such liability may be enforced by an action against him in the name of the sheriff," Revisal, sec. 2862, giving certain priorities prescribed by Revisal, sec. 89. *Ibid.*

12. *Taxation — Forms—Auditor—Mandamus—Procedure.*—In our Constitution the property tax is the standard of equation, and by it the poll tax must be measured, and when the Legislature has not observed this equation in levying the poll tax and providing machinery for its collection, the error can be corrected by a mathematical calculation; and at the suit of the Governor a mandamus will lie against the Auditor to compel him to prepare the forms for assessing and taxing the polls in accordance with section 1, Article V of the Constitution. *Russell v. Ayer*, 120 N. C., 180, overruled. *Kitchin v. Wood*, 565.

13. *Constitutional Law — Right of Accused—Sentence—Sentence Invalid—Procedure.*—When a valid trial of the accused has been had in his absence, he having waived his right to be present at the trial by having fled the court, and a sentence

PROCEDURE—*Continued.*

has been erroneously passed on him in his absence, the judgment of the trial court will be set aside and the cause remanded with direction that a lawful sentence be imposed; the defendant being in custody of the court pending the appeal, and the appeal being regularly presented. The case of *S. v. Keebler*, 145 N. C., 560, cited and distinguished. *S. v. Cherry*, 624.

PROCEEDINGS. See Courts, 22.

PROMISE. See Contracts, 34, 35; Fraud, 3, 5.

PROOF. See Evidence; Pleadings.

PROSECUTRIX. See Evidence, 17.

PROSPECTIVE VALUE. See Measure of Damages, 5, 7, 8.

PROXIMATE CAUSE. See Negligence, 2, 19, 20, 21; Contributory Negligence, 3.

PUBLIC-SERVICE CORPORATIONS. See Electricity, 1, 2, 3.

PUNISHMENT. See Interpretation of Statutes, 9.

PUNITIVE DAMAGES. See Evidence, 2.

PURCHASER. See Deeds and Conveyances, 29, 52; Sales, 2.

QUESTIONS FOR JURY.

1. *Evidence—Negligence—Burden of the Issue—Questions for Jury.*—Where the doctrine of *res ipsa loquitur* applies, the question of a defendant's responsibility must be referred to the jury, not under any presumption changing the burden of the issue, but as presenting a cause in which evidence has been offered from which negligence on the part of the defendant may be inferred. *Turner v. Power Co.*, 132.

2. *Evidence — Negligence — Electricity — Nonsuit.*—Where it appeared that plaintiff on entering his store in the early evening took hold of the electric lamp suspended from the ceiling by a cord, to turn on the light in the ordinary and usual way and in the same manner he had been accustomed to do without injury for a year or more, and under like conditions, and received an electric shock causing serious physical injury; and it further appeared that the amount of voltage stipulated for in the contract between the parties is not likely to produce any harmful results if proper care is observed in its transmission; and further, that all the appliances within the building, which were in the care and con-

QUESTIONS FOR JURY—*Continued.*

trol of other persons, were at the time in good order, and the question of defendant's responsibility was confined to the operation and condition of the appliances and wires used in conveying the electricity into the building, and which were in the exclusive care and control of the defendant: *Held*, the doctrine of *res ipsa loquitur* applies, and the trial court properly refused to nonsuit plaintiff on the alleged ground that there was an entire lack of testimony to sustain plaintiff's cause of action. *Ibid.*

3. *Marriage—Seduction—Breach of Promise—Evidence—Causal Connection—Questions for Jury.*—In the trial of an indictment for seduction under the statute, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse; and in this case it may be inferred by the jury under evidence tending to show the reputation, innocence, and virtue of the woman, the seduction under the promise, the prior intimacy and relations of the parties, the birth of the child and its resemblance to the defendant and his flight after indictment. *S. v. Malonee,* 200.

4. *Marriage — Seduction — Breach of Promise — Instructions — Weight of Evidence—Questions for Jury.*—The remarks of the judge to the jury upon the flight of the defendant from the State after indictment did not constitute reversible error when considered in connection with all the evidence, as the jury should pass upon the whole evidence and decide what weight should be given the fact of flight, and to what extent the explanatory evidence affected the probative force of the flight as a fact tending to show guilt. *Ibid.*

5. *Debtor and Creditor—Mortgage—Proceeds—Payment—Application—Question for Jury.*—When the debtor owes a debt secured by a chattel mortgage, and another debt not secured, and makes payment to his creditor with a part of the proceeds of the property secured by the mortgage, of which the creditor was aware, the execution of the mortgage was an application of the payment upon the debt it secured, which the creditor cannot change without the debtor's consent, and upon conflicting evidence presents a case for the jury upon the issue. *Lee v. Manley,* 244.

6. *Negligence — Evidence — Inference — Questions for Jury.*—An issue of negligence must be submitted to the jury, and a nonsuit upon plaintiff's evidence should not be granted, when therefrom two minds could reasonably draw different conclusions, one of which would be favorable to the plaintiff. *Harvell v. Lumber Co.,* 254.

QUESTIONS FOR JURY—*Continued.*

7. *Same—Evidence—Nonsuit—Questions for Jury.*—In an action for damages by the servant against the master for the latter's alleged negligence in permitting a hole to remain in a passway over a platform at his lumber plant where the plaintiff was required to go in the discharge of his duties, there was evidence on behalf of plaintiff tending to show: that he had some time before informed the defendant of the defect, and it had promised to remedy it; that plaintiff in discharge of his duties was going along the passway with an empty truck, weighing 115 pounds, on his shoulder, groping his way with his right hand along defendant's kiln in the smoke from defendant's kilns, which rendered him unable to see the hole, though he knew it was there; that he would have had to wait about fifteen minutes before the smoke would have cleared away, but had he waited he would have been discharged: *Held*, it was a question for the jury as to whether the plaintiff acted as a man of ordinary prudence, and a motion by defendant to nonsuit upon the evidence was properly denied. *Ibid.*

8. *Public Inns — Guests — Contributory Negligence—Evidence—Questions for Jury.*—In this case there was evidence tending to show that the plaintiff, a guest at defendant's hotel, was shown into a bedroom wherein there was a defective gas fixture by which a light was furnished to the occupant, by reason of not having a safety-pin to prevent the turning of the key all the way around, and that the gas fixture was not safe in consequence; that before retiring for the night the plaintiff discovered the absence of this safety-pin, but turned the key to where it should have stopped, and could smell no gas escaping, and thereupon he retired, but was injured by asphyxiation that night when asleep: *Held*, a motion to nonsuit was properly denied, there being evidence of defendant's negligence; and it was for the jury to say whether according to the rule of the prudent man, the plaintiff was guilty of such contributory negligence as would bar his recovery. *Patrick v. Springs*, 270.

9. *Master and Servant—Instructions to Servant—Inexperienced Servant—Dangerous Machinery—Questions for Jury.*—If an employee is instructed by the master to do a dangerous act without warning against danger, he having had no experience in doing the act, the question of negligence is for the jury. *Walters v. Sash and Blind Co.*, 323.

10. *Same—Dangerous Machines—Repair—Obvious Danger—Rule of the Prudent Man—Contributory Negligence—Questions

QUESTIONS FOR JURY—*Continued.*

for Jury.—The plaintiff, an employee 19 years of age, was changed, under his protest, from working at a harmless machine to a dangerous one, the latter machine being badly out of repair and containing revolving knives run by machinery. The plaintiff showed his superior that the result of the work upon the machine was unsatisfactory, and was instructed to do the best he could; also, to "get a monkey-wrench and see if he could raise the bed back to its pròper place." The bed having slipped down, left the revolving knives exposed, and while the plaintiff was endeavoring to raise the bed with a worn monkey-wrench, the wrench slipped from a nut he was working on, and his fingers were cut off by the revolving knives: *Held,* (1) it was negligence for the master not to have instructed the servant in the operation of the dangerous machine, and in ordering him to repair it without instructions as to stopping it, etc.; (2) there being no evidence that plaintiff knew of the danger in attempting to repair the machine, the danger was not so obvious that a reasonably prudent man would not have undertaken it, and a judgment of nonsuit was improperly allowed. *Ibid.*

11. *Deeds and Conveyances — Calls — Boundaries—Questions for Jury—Instructions.*—Where there is ambiguity in the calls of a deed the jury should be instructed by the judge upon the established rules of law applicable, so that they may be aided in their finding upon the evidence as to the true location of the calls; and it is none the less the duty of the judge to so instruct the jury as to what is a boundary, and where it is, when the facts are undisputed and the parties concede that its location is to be fixed by a legal construction of the deed. *Sherrod v. Battle,* 345.

12. *Master and Servant — Appliances—Defects—Evidence—Questions for Jury.*—While plaintiff was striking with a sledge hammer a chisel held by defendant's boiler-maker while cutting slack rivets from a boiler, in the course of his employment, a piece of the chisel, under a blow from the hammer, flew off and injured the plaintiff's eye, causing the damage alleged in the action. There was evidence tending to show that it was the duty of the boiler-maker, whom plaintiff was employed to assist, to keep the tools in repair; that plaintiff had been working as his assistant for about a month, and that he handed a chisel to plaintiff to use, which the latter did without opportunity for inspection; that the head of the chisel was too large, and the chisel itself too thin, etc.; that plaintiff struck with the hammer when and as directed by the boiler-maker: *Held,* under the rule, view-

QUESTIONS FOR JURY—*Continued.*

ing the evidence in its most favorable light for the plaintiff, the question as to defendant's negligence was one for the jury to determine. *Martin v. Mfg. Co.*, 128 N. C., 264, cited and distinguished. *Mercer v. R. R.*, 399.

13. *Negligence—Master and Servant—Safe Place to Work—Safe Appliances—Evidence—Assumption of Risks—Questions for Jury.*—The plaintiff was employed to pack lint cotton in defendant's packing-room at its cotton mills as it was blown there with the use of steam fans, the room being 7 feet wide, 14 feet long and 14 feet high. There was evidence tending to show that the door to this room was negligently bolted from the outside, and that through the negligence of the defendant in not keeping the oil cups of the engine in proper repair and in not securely fastening the engine, the lint cotton caught afire while plaintiff was at work, to his damage; that he had to force open the door, as no one heard his calls; that while fire from the ignited cotton covered the room he had to dig down through the cotton to the door, which should have been opened from the inside, and that to get out it was customary to call to employees on the outside; that the machinery had not been inspected during the six months of plaintiff's employment; that another like machine used by defendant did not shake while in operation; and that the fire originated at the bearings of the defective machine, and that lint cotton was on the machinery and connecting pipes. The judge correctly charged upon the questions of *res ipsa loquitur*, of accident, of the duty of the master to furnish his servant a safe place to work, of the master's duty to furnish and inspect the appliances used, and it is *Held*, (1) the evidence is sufficient to go to the jury upon the question of defendant's negligence; (2) that an employee does not assume the risk of an injury caused by the failure of the master to perform a duty imposed on him by law, in furnishing a safe place to work, and this duty cannot be delegated to another so as to exempt the master from liability. *Norris v. Mills*, 474.

14. *Railroads—Fire—Negligence—Evidence, Nonexpert—Questions for Jury.*—In an action for damages caused by defendant's passing locomotive emitting a spark which destroyed plaintiff's dry-kiln by fire, recovery was resisted upon the ground that the locomotive was properly equipped and handled, and that the fire originated within the kiln by the overheating of the steam pipes, and that heat ascends, and consequently fire would break out in the top of the kiln first: *Held*, the opinion of witnesses was incompetent as nonexpert evidence,

QUESTIONS FOR JURY—*Continued.*

which was to the effect that the pipes could not have caused the fire as stated, it being the very question the jury was to decide, and in which they could draw their own inferences from the evidence. *Deppe v. R. R.*, 523.

15. *Appeal and Error—Issues of Fact—Questions for Jury.*—In the defendant's appeal it appears that the jury found for plaintiff upon matters of fact properly submitted, and no error is found. *Carson v. Bunting*, 530.

16. *Street Railways—Alighting Passengers—Negligence—Questions for Jury—Instructions.*—In an action for damages against a street car company for negligence alleged in suddenly starting the car while plaintiff, a woman of 58 years, seeming to the conductor to be "old and clumsy," was alighting at her destination, of which she had previously notified the conductor, from an ordinary summer car with seats running across and handholds at either end of the seats, the distance from the floor of the car to the running-board being 17 inches and from that to the ground 25 inches, the ground sloping at the place somewhat over 9 inches, an instruction is proper, that if the jury should find, under supporting and conflicting evidence, that if the car was suddenly started and jerked as the plaintiff was alighting with one foot on the running-board and the other in the act of descending to the ground, whereby the plaintiff was thrown to the ground, they should answer the issue of negligence "Yes," but otherwise if the plaintiff fell on the sloping ground after leaving the car. *Morarity v. Traction Co.*, 586.

17. *Street Railways—Alighting Passengers—Duty of Conductor—Rule of the Prudent Man—Negligence—Questions for Jury.* As to whether a street-car conductor owes a duty to assist a passenger to alight is a question for the jury, under the rule of the prudent man, with the burden of proof on plaintiff, where such assistance would seem to be required; and defendant's negligence is a question for the jury when there is evidence tending to show that plaintiff was a woman 58 years old, appeared to the conductor to be "old and clumsy," was injured while alighting from a summer car at a customary stopping point, her destination, of which she had previously notified the conductor, and where the ground sloped more than 9 inches. *Ibid.*

18. *Negligence—Release—Agreeing Mind—Questions for Jury.*—In this case there was evidence tending to show that defendant obtained a release from plaintiff for damages in consideration of $10 and the payment of plaintiff's drug and doctor's

QUESTIONS FOR JURY—*Continued.*

bill, soon after the injury complained of was inflicted, while the latter was in bed suffering from the effects of the injury and under the influence of drugs: *Held,* it was a question for the jury to determine whether the plaintiff at the time of the execution of the release had sufficient mental capacity to understand its nature and effect. *Ibid.*

QUI TAM ACTIONS. See Constitutional Law, 22.

RACES. See Descent and Distribution, 3; Schools and School Districts, 1, 2, 5, 6.

RAILROADS. See Master and Servant, 1.

1. *Railroads—Fellow-servant Act—Scope—Interpretation of Statutes.*—While the provisions of the Fellow-servant Act, Revisal, sec. 2646, do not extend to a railroad in process of construction before it is operated as a railroad, it does apply, when the railroads are in operation, to their employees in the course of any department of the work embraced in or incidental to the operation of the road. *Twiddy v. Lumber Co.*, 237.

2. *Same—Lumber Roads.*—The provisions of the Fellow-servant Act, Revisal, sec. 2646, apply to lumber roads that operate a railroad, and with full force and effect to all their employees in the course of their service in the operation of the railroad, or any department of it. *Ibid.*

3. *Same.*—The provisions of the Fellow-servant Act do not extend to employees of a lumber company who are not connected with the operation of a railroad of the company. *Ibid.*

4. *Same—Evidence—Actionable Negligence—Accident.*—Plaintiff in the line of his duty was sawing at one end logs for the defendant, at its lumber plant, which logs were to be placed on defendant's railroad car by appliances run by steam, known as a "skidder" and a "loader." The other ends of logs were sawed by other of defendant's employees, and the negligence complained of was the failure of these other employees to give plaintiff notice that a log, which rolled upon plaintiff, to his injury, was about to do so. There was no evidence that plaintiff was a part of a train crew or directly engaged in operating the "skidder" or the "loader": *Held*, the Fellow-servant Act, Revisal, sec. 2646, has no application. *Semble*, the injury resulted from an accident, and there was no actionable negligence shown on the part of the defendant. *Ibid.*

RAILROADS—*Continued.*

5. *Same — Railroads — Material Delivered—Accessibility—Additional Work—Damages.*—In an action to recover a balance alleged to be due the plaintiff under his contract with defendant to build a railroad trestle, and for damages for failure to supply material stipulated for in the manner provided for in the contract, it appeared from the contract sued on that the defendant agreed "to deliver all material for the trestle on cars or on the ground within 300 feet of the trestle, and to be furnished in such manner and time as not to impede the plaintiff (contractor) in the performance of his part of the contract": *Held,* (1) the contract contemplated that defendant should deliver the material within 300 feet of the work, at a point from which a haul could be made to the best advantage, having reasonable regard to the nature of the ground and the attendant facts and circumstances; (2) that under a contract of this character and extent, requiring completion within a specified time, delivery of the material within the specified distance from the work, but across a slough, requiring an additional haul of half a mile, was not such delivery by defendant as called for in the contract, and for such additional work the plaintiff was entitled to recover extra compensation. *Brown v. R. R.*, 300.

6. *Contracts—Breach—Appliances—Railroads—Pile Drivers.*—In an action by plaintiff to recover damages of the defendant railroad alleged by breach of contract requiring the latter to supply at certain places, under the terms of the contract, material for the former to build a trestle, there was a confirmation by the lower court of the referee's findings, upon evidence to support them, that by reason of such delay plaintiff's pile driver remained idle for thirty days at a net rental value of $2.50 per day, and this was not infrequently rented by plaintiff for a definite sum: *Held,* the measure of damages was the rental value of the pile driver for the time it remained idle through defendant's default, under the contract. *Ibid.*

7. *Railroads — Fellow-servants — Logging Roads.* — The Fellow-servant Act (Revisal, 2646) applies to logging roads using the agency of steam. *Bissell v. Lumber Co.*, 152 N. C., 125, cited and approved. *Roberson v. Lumber Co.*, 328.

8 *Railroads — Master and Servant—Employees—Usage—Actionable Negligence—Warning.*—The plaintiff, an employee of defendant railroad, boarded the defendant's train for the purpose of going home from his work, which had been customary: *Held,* it was actionable negligence for the employees

RAILROADS—*Continued.*

of the train to suddenly start the train forward, without notice or warning, while the plaintiff was getting off at his usual place, and thus causing him to be thrown to the ground to his injury. *Ibid.*

9. *Railroads — Negligent Burning — Right of Way—Combustible Material—Causa Causans—Burden of Proof.*—To recover damages of a railroad company for carelessly and negligently communicating fire to its right of way which spread to and burned plaintiff's lands, the burden of proof is on plaintiff to show that defendant negligently permitted combustible matter to accumulate on its right of way and that defendant communicated fire from its engine to its foul right of way and from thence it was communicated to plaintiff's land and caused the injury. *Maguire v. R. R.*, 384.

10. *Railroads—Negligence—Right of Way—Foul Condition—Fire—Duties.*—It is only the duty of a railroad company with respect to its right of way to keep its roadbed and track and a reasonable distance on its right of way clear of such substances as are liable to be ignited by sparks or cinders from its engine. *Ibid.*

11. *Same—Evidence—Nonsuit.*—In an action for damages to plaintiff's land alleged to have been caused by fire communicated to its foul right of way and from thence to plaintiff's land, there was evidence tending to show that when first discovered the fire was burning down the county road, off the right of way, and 100 yards from the railroad; that on the right of way, which had been burned over, from 30 to 50 feet from the track, there were "chunks" smoking as if they had just been burned, with no evidence to indicate the character of the "chunks," or that they constituted combustible material, and nothing to indicate that the fire originated there: *Held*, evidence insufficient, and a judgment of nonsuit upon defendant's motion should have been allowed. *Ibid.*

12. *Same—Causa Causans.*—For the plaintiff to recover damages by fire communicated to his land alleged by reason of the foul condition of defendant's right of way, the mere fact that the defendant's engine passed more than two hours before a fire was discovered off the right of way is insufficient evidence to be submitted to the jury upon the question of whether the defendant's engine had caused it, there being no evidence to show that a fire was not there before the engine passed or as to the character and direction of the wind, or that the engine was throwing sparks when it passed. *Ibid.*

RAILROADS—*Continued.*

13. *Railroads — Negligence—Burning—Evidence—Nonsuit.*—In an action to recover damages for the destruction of plaintiff's residence, alleged to have been caused by fire communicated to the house, which was situated near the defendant's right of way, by sparks from defendant's passing engine, there was evidence tending to show that no fire was within the house which could have caused the damage; that plaintiff and his family, between midnight and 2 o'clock A. M., stood on his front porch and watched the defendant's train pass, and the engine was throwing sparks from its smokestack in great quantities, with the wind blowing from that direction toward the house, which was enveloped by sparks; that soon after plaintiff and his family retired he was awakened by noises which proved to come from his burning house, which was completely destroyed, and that day broke about two hours after the fire was over. There was evidence in defendant's behalf tending to show that its engine was equipped with the best approved type of spark arrester in general use, and that no sparks were emitted from its engine: *Held*, approving the rule that the evidence must be construed in the most favorable light to the plaintiff, when a motion to nonsuit is made, that the plaintiff had made out a *prima facie* case, and was entitled to go to the jury upon the issue as to defendant's negligence. *Kornegay v. R. R.*, 389.

14. *Instructions, How Construed—Correct as a Whole.*—The charge of the court to the jury must be considered as a whole and not disconnectedly, and each instruction must be construed with reference to what preceded and followed it; and when the charge as thus viewed is correct, detached portions thereof, even in themselves subject to criticism, do not constitute reversible error. *Ibid.*

15. *Same—Railroads—Negligence—Burning—Evidence.*—In an action against a railroad company to recover damages for burning the plaintiff's house, alleged to have been negligently caused by sparks from the defendant's engine, the judge correctly instructed the jury, in substance, that if the house caught fire from sparks which were emitted from the engine, it made out a *prima facie* case of negligence, but they would not find against the defendant upon the issue if they concluded, after consideration of all the proof, that the defendant's engine had a spark arrester, not the best, but of approved make and in general use, and that the train was carefully handled, so that there was no negligence on the defendant's part. *Ibid.*

RAILROADS—*Continued.*

16. *Railroads — Pedestrians on Track—Danger—"Look and Listen"—Negligence.*—One who walks on a main-line railroad track, in full possession of his faculties, when there are quite a number of lateral tracks in constant use, with walkways between them for the safety of pedestrians, and from his previous experience as an employee of the road he should have known that, at the time, a work train carrying employees to their work customarily passed, owes a duty to keep a lookout for the dangers to himself necessarily attending his action; and when it appears from his own evidence, construed in the light most favorable to him, that the injury complained of was caused by his failure or omission to perform this duty, his negligence will bar his recovery. *Exum v. R. R.*, 408.

17. *Railroads — Pedestrians — Licensee—Danger—"Look and Listen"—Duties.*—Whether a trespasser or licensee, one walking on a railroad track should look, listen, and exercise the vigilance required by the surroundings, circumstances, and conditions, and the same obligation in that respect rests upon both. *Ibid.*

18. *Railroads — Pedestrians — Danger—"Look and Listen"—Duty of Engineer—Duty of Pedestrian—Avoidance of Injury—Nonsuit.*—The plaintiff's intestate, a sound man, with no apparent infirmity, and an employee of defendant railroad company, was walking along the main-line track going to his work, at the time a train provided for the purpose of taking him and other employees to their work customarily passed. At this place there were many lateral tracks, having walkways between them for pedestrians, upon which trains were constantly passing. The employees' train, going in the same direction as plaintiff's intestate, overtook and killed him as he was walking briskly along on the track. A witness testified that he saw intestate's danger, and in view of the plaintiff and defendant's engineer ran from 20 to 30 feet in direction of intestate, waving his hands and shouting to warn the intestate of his danger, but did not attract the attention of any one: *Held,* (1) it was equally incumbent upon the intestate as well as the engineer to keep a sharp lookout, and the latter had the right to assume, had he seen the signals, that the intestate would see and hear the warnings of the witness, and would step off the track at the last moment and avoid the injury; (2) judgment of nonsuit upon the evidence was properly sustained. *Ibid.*

19. *Railroads—Pedestrians—Danger—"Look and Listen"—Negligence, Concurrent.*—Where a pedestrian and an engineer of

RAILROADS—*Continued.*

a railroad company are both negligent in failing to keep a proper lookout for danger, and in consequence the pedestrian is run over and killed or injured, the negligence of both is concurrent, and no recovery may be had in an action for damages against the company. *Ibid.*

20. *Railroads—Damages—Fire—Negligence.*—A railroad company is not liable in damages for a fire originating off its right of way caused by a spark from its properly equipped locomotive properly managed by a competent engineer. *Deppe v. R. R.*, 523.

21. *Same—Evidence, Nonexpert—Questions for Jury.*—In an action for damages caused by defendant's passing locomotive emitting a spark which destroyed plaintiff's dry-kiln by fire, recovery was resisted upon the ground that the locomotive was properly equipped and handled, and that the fire orignated within the kiln by the overheating of the steam pipes, and that heat ascends, and consequently fire would break out in the top of the kiln first: *Held,* the opinion of witnesses was incompetent as nonexpert evidence, which was to the effect that the pipes could not have caused the fire as stated, it being the very question the jury was to decide, and in which they could draw their own inferences from the evidence. *Ibid.*

22. *Railroads — Crossings — Warnings — "Look and Listen"—Obstructed View—Negligence.*—When there is evidence that the plaintiff was injured by defendant's locomotive coming without warning or signals while he was crossing the track; that before crossing he had listened for the approach of locomotives without hearing any, and that the one causing the injury came unexpectedly from a direction where the view was obstructed by cars standing on the track, the question of defendant's negligence is a proper one for the jury. *Wolfe v. R. R.*, 569.

23. *Same—Contributory Negligence—Exceptions.*—A person in attempting to cross a railroad track must both look and listen when he gets within the zone of danger, and while his failure to do so ordinarily bars his recovery for an injury received by reason of his attempting to cross, yet attendant circumstances may so qualify this obligation as to require the question of contributory negligence to be submitted to the jury. *Ibid.*

24. *Same—Master and Servant—Scope of Employment.*—At a public crossing over defendant's road where there were a large

RAILROADS—*Continued.*

number of defendant's railroad tracks, plaintiff was employed by it as a watchman to warn those desiring to cross of danger in their doing so which might then exist. At the time in question plaintiff, in the discharge of his duties, desired to warn a person preparing to cross of his danger from a shifting engine, and, after listening for the approach of locomotives without hearing anything, attempted to cross the track for the purpose of the contemplated warning, and was injured by an engine of defendant passing on the main line. There was evidence tending to show that the plaintiff was watching the shifting engine and the person he desired to warn, at the time he received his injury, and that the engine which injured him came without signals or warnings from a direction where the view was obstructed by cars standing on side or lateral tracks to the main line: *Held,* (1) under these circumstances the defendant owed plaintiff the positive duty by active vigilance to warn him, by proper signals, of the approach of the locomotive, and the question of contributory negligence was properly submitted to the jury; (2) the plaintiff was not held to have assumed the risks of the defendant's negligent failure to give the proper signals or warnings of its passing locomotive. *Ibid.*

25. *Same—Rule of the Prudent Man—Instructions.*—The plaintiff, employed by defendant to warn those desiring to cross its many tracks at a public crossing of any danger which might exist, was injured by a passing locomotive while endeavoring to discharge his duties under circumstances which rendered the issue of contributory negligence a proper one for the jury, and it is held that this case is governed by the "rule of the prudent man," and that the trial judge properly instructed the jury that it was plaintiff's duty to exercise all reasonable vigilance by looking as well as listening for approaching trains as the circumstances and his occupation and duty to the traveler permitted; and that if he failed to do so, it was such contributory negligence as barred his recovery. *Ibid.*

26. *Railroads—Discrimination—Rebates—Contracts—Tramroads.*—From the uncontradicted evidence in this case it appears that plaintiff, the owner of a tramroad, bought lumber and timber from third parties to be delivered at defendant's railroad under contract with the latter that he be allowed ½ cent per 100 pounds for hauling it over the tramroad to its junction with railroad: *Held,* there being no allegation or evidence tending to show that the rate charged over plaintiff's tramroad was excessive or that the transaction was a

RAILROADS—*Continued.*

mere device to evade the statute against rebating, or that it was a discrimination in any manner, the plaintiff's charge for the haulings was a valid one, which he could recover against the defendant railroad company. *Wilcox v. R. R.*, 582.

27. *Street Railways—Alighting Passengers—Negligence—Questions for Jury—Instructions.*—In an action for damages against a street car company for negligence alleged in suddenly starting the car while plaintiff, a woman of 58 years, seeming to the conductor to be "old and clumsy," was alighting at her destination, of which she had previously notified the conductor, from an ordinary summer car with seats running across and handholds at either end of the seats, the distance from the floor of the car to the running-board being 17 inches and from that to the ground 25 inches, the ground sloping at the place somewhat over 9 inches, an instruction is proper, that if the jury should find, under supporting and conflicting evidence, that if the car was suddenly started and jerked as the plaintiff was alighting with one foot on the running-board and the other in the act of descending to the ground, whereby the plaintiff was thrown to the ground, they should answer the issue of negligence "Yes," but otherwise if the plaintiff fell on the sloping ground after leaving the car. *Morarity v. Traction Co.*, 586.

28. *Street Railways—Alighting Passengers—Duty of Conductor—Rule of the Prudent Man—Negligence—Questions for Jury.* As to whether a street-car conductor owes a duty to assist a passenger to alight is a question for the jury, under the rule of the prudent man, with the burden of proof on plaintiff, where such assistance would seem to be required; and defendant's negligence is a question for the jury when there is evidence tending to show that plaintiff was a woman 58 years old, appeared to the conductor to be "old and clumsy," was injured while alighting from a summer car at a customary stopping point, her destination, of which she had previously notified the conductor, and where the ground sloped more than 9 inches. *Ibid.*

RATIFICATION. See Deeds and Conveyances, 5, 28; Equity, 3; Highways, 5, 7; Mortgage, 7.

REBATES. See Railroads, 26.

RECEIVER. See Corporations, 5, 7, 8, 9, 10, 11, 12; Courts, 18; Usury, 8.

RECORD. See Appeal and Error, 4, 10; Evidence, 63, 64.

REFERENCE.

1. *Reference Agreed—Power of Court—Procedure.*—The court cannot set aside the method of trial agreed upon by the parties to a consent reference. *Rogers v. Lumber Co.*, 108.

2. *Reference Compulsory—Exceptions—Power of Court.*—When either party to a compulsory reference reserves his right to a jury trial, the judge can set the reference aside and submit the case to the jury upon proper issues. *Ibid.*

3. *Same—Issues.*—The judge is not precluded by the issues formulated by the party excepting to a reference; he should submit the issues properly raised by the pleadings. *Ibid.*

4. *Same—Objections and Exceptions.*—A party who does not except to a reference cannot object that the issues were not restricted to those formulated by the other party. He can except only that the issues actually submitted were not such as are determinative of the controversy raised by the pleadings, and did not permit him to present every phase of the controversy. *Ibid.*

5. *Appeal and Error—Referee—Findings—Judgment—Evidence.*—The findings of fact by a referee, supported by evidence and sustained by the trial court, are not reviewable on appeal. *Brown v. R. R.*, 300.

6. *Reference—Exceptions—Acquiescence.*—Upon a judgment establishing the right of one of the contesting parties as a tenant in common of lands, an exception to the order of reference of the cause to the clerk to take and state an account of the rents and profits, with a demand for a jury trial, comes too late, as by not excepting at the time of the order the party is deemed to have acquiesced therein. *Wynn v. Bullock*, 382.

7. *Reference—Evidence—Judgment—Appeal and Error.*—Exceptions to the findings of fact by a referee, with evidence to support them, approved by the trial judge, are not reviewable on appeal. *Ibid.*

8. *Appeal and Error—Reference—Remand—Rereference—Procedure.*—Upon appeal in this case the Court so decidedly departed from the basis of accounting adopted by the referee that it is directed that it be remanded to him with directions to restate the account and revise his findings of fact, hearing further testimony if he considers it desirable to do so. *Tart v. Tart*, 502.

REFORMATION. See Deeds and Conveyances, 45.

REGISTRATION. See Liens, 3; Deeds and Conveyances, 4, 10, 30.

RELEASE. See Damages, 1; Negligence, 14; Contracts, 42.

RELIGIOUS SOCIETIES.

1. *Associations—Churches—Powers—Agreement—Custom.*—A voluntary association of churches has no existence or powers except those contained in its formal articles of agreement or established by custom acquiesced in by the parties to it; and when, as here, it consists of an annual meeting of delegates from its constituent members, the churches, to further certain common interests, the organization is dissolved upon adjournment into its individual elements until reassembled pursuant to the common agreement. *Kerr v. Hicks*, 265.

2. *Same — School Trustees — Appointment—Regular and Called Meetings.*—A voluntary association of churches chartered and established a school, naming, as authorized, trustees for the school. The constitution of the association provided that it "may be altered or amended at any regular meeting . . . by a two-thirds vote of the members present." At a regular annual meeting the church of "Blessed Hope" was designated as the place for the next annual meeting. Subsequently, the officers of the association met and decided to "withdraw fellowship" from "Blessed Hope," rescinded the resolution to meet there and designated a different church in another locality for that purpose, where a majority of the churches were represented by delegates. Delegates from the majority and minority number of the churches met at each of the respective places on the day appointed, and at each meeting trustees for the school were elected: *Held*, (1) that the meeting at "Blessed Hope" was the legal one, and the trustees appointed by a majority vote of the delegates there present were those legally entitled to administer the affairs of the school. *Simmons v. Allison*, 118 N. C., 774, cited and distinguished. *Ibid.*

3. *Associations — Churches — Powers — Trustees — Appointment —Parties—Court's Discretion.*—At a meeting regularly held by a voluntary association of churches, trustees were appointed for a school chartered by the association. At the same time, but at a different place, there was a meeting called by the officers of the association, when and where other and conflicting trustees were appointed. The question at issue being which set of trustees were the ones legally qualified to act, it was *Held*, (1) that the trustees appointed at these meetings were the real parties in interest, and it was not error for the trial judge in his discretion to order them

RELIGIOUS SOCIETIES—*Continued.*

to be made parties, so that the matter might be decided upon its merits (Revisal, 507); (2) no appeal lies from the refusal of a motion to dismiss, and an entry of appeal not perfected is treated as an exception on appeal from the final judgment. *Ibid.*

4. *Same — Exceptions — Appeal and Error — Procedure.* — The amendment making additional parties does not affect the decision in this case, as thereby the subject of the controversy was not changed, the additional parties being the beneficiaries for whom this action was brought, and proper parties (Revisal, 400); and if it be conceded that the solicitor was an unnecessary party, that is not ground for an exception. *Ibid.*

REMAND. See Appeal and Error, 10.

REMEDY AT LAW. See Equity, 10.

REMOVAL OF CAUSES.

1. *Equity — Contracts — Specific Performance — Vendor's Lien—Sales—Removal of Causes.*—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is removable to the county in which the land is situated. Revisal, sec. 419. *Councill v. Bailey*, 54.

2. *Counties — Taxation—Conflicting Demands—Injunction—Parties—Misjoinder—Removal of Causes—Discretion of Court—Procedure.*—This action involves a controversy between two counties as to which is entitled to assess taxes upon the same personal property, consisting of solvent credits. The sheriff of one county seized the property in the hands of an administrator as that of a deceased resident, and the sheriff of the other claims it as that of one of its citizens to whom the deceased is alleged to have duly assigned it before June 1. The administrator of deceased and the alleged assignee seek to enjoin the sheriffs of both counties from selling the property for taxes, offering to pay into court the taxes on the larger amount assessed: *Held*, (1) the main relief is that by injunction, and the injunction should be continued; (2) the pleadings relate to one transaction, and there is no misjoinder of parties; (3) the plaintiffs could elect to sue in

REMOVAL OF CAUSES—*Continued.*

either county; (4) the question of the removal of the action in effect involved the contest of the two counties over a fund and within the discretion of the trial judge; (5) the right of either county to the tax depended upon the place of residence of the true owner, a question of fact for the jury under conflicting evidence; (6) the plaintiffs should not be required to pay the tax and sue the respective counties to recover it back; (7) the remedy by injunction is the proper one. Revisal, secs. 821, 2855. *Sherrod v. Dawson*, 525.

RENTAL. See Measure of Damages, 3, 4.

RENTS AND PROFITS. See Descent and Distribution, 6, 7.

RESERVATION. See Deeds and Conveyances, 17.

RES IPSA LOQUITUR. See Evidence, 9.

RESPONDEAT SUPERIOR. See Contracts, 7; Master and Servant, 11, 12, 14.

RESTRICTIVE RIGHTS. See Insurance, 1.

REVERSION. See Cities and Towns, 13.

REVISAL. For exactness, see the appropriate headings.

SEC.

89. Actions in name of the sheriff may be brought against executor or administrator to pay taxes due by the estate. *Sherrod v. Dawson*, 526.

400. Those having the beneficial interest in subject of litigation are proper parties. *Kerr v. Hicks*, 265.

415. Upon the death of the insured the cause of action survives, and enforcible when. *Kelly v. Trimont Lodge*, 97.

419. Suit partaking of nature of foreclosure of mortgage removable to county in which land situated. *Councill v. Bailey*, 54.

440. May recover of nonresident here for work done in this State wherein breach of contract occurred. *McDonald v. MacArthur*, 122.

453. Does not abridge the power of court to appoint receiver to secure rents and profits. *Arey v. Williams*, 610.

535. Expressions of trial judge, that he is not sure he understands plaintiff's claim, not such as prohibited. *McDonald v. MacArthur*, 11.

REVISAL—*Continued.*

SEC.

579. His parol executory agreement to convey land in satisfaction of judgment cannot be enforced by the promisor. *Brown v. Hobbs*, 544.

638. Statutes have no retroactive effect. *Davenport v. Fleming*, 291.

821. Remedy by injunction is proper to restrain enforcement by sheriffs of different counties of taxes claimed on same personal property. *Sherrod v. Dawson*, 525.

847. When the court may appoint receiver of a corporation to administer its assets. *Silk Co. v. Spinning Co.*, 421.

974. Not within the statute of frauds, as a promise to answer the debt of another, for vendee of a vendee of timbered interests in lands to show the former had agreed to pay the original vendor out of certain profits in cutting the timber. *Rogers v. Lumber Co.*, 108.

976. Requires an executed and not an executory contract to convey lands to be in writing. *Rogers v. Lumber Co.*, 108.

1203. When the court may appoint receiver of a corporation to administer its assets. *Silk Co. v. Spinning Co.*, 421.

1219. When the court may appoint a receiver of a corporation to administer its assets. *Silk Co. v. Spinning Co.*, 421.

1222. A receiver of an insolvent corporation may set up a usurious contract in defense. *Riley v. Sears*, 509.

1224. When and to what extent property of insolvent corporation vests in receiver. *Withrell v. Murphy*, 82.

1249. Defendant taxed with cost of all when plaintiff recovers in one cause of action. *Cotton Mills v. Hosiery Mills*, 462.

1541. It is duty of attorneys to take notice of the sittings of the Superior Court, and not of the judge to send for them except for "unusual reasons," which are determined in his discretion. *S. v. Denton*, 641.

1556. Rules 9 and 10. Illegitimates must have the same right of inheritance among themselves as legitimates; no half blood between them, and they inherit through their mother. *Ashe v. Mfg. Co.*, 241.

1594. Regulation of methods by which laws of another State proved here. *Miller v. R. R.*, 441.

1748. Interest necessary to maintain action to vacate grant of oyster bed. *Jones v. Riggs*, 281.

1750. Interest necessary to maintain action to vacate grant to oyster bed. *Jones v. Riggs*, 281.

1822 (2). *Certiorari* in *habeas corpus* denied when from final judgment of competent jurisdiction. *In re Holley*, 163.

1827. *Certiorari* in *habeas corpus* denied when from final judgment of competent jurisdiction. *In re Holley*, 163.

REVISAL—*Continued.*

SEC.

1848 (2). *Certiorari* in *habeas corpus* denied when from final judgment of competent jurisdiction. *In re Holley*, 163.

1854. No appeal in *habeas corpus* proceedings where custody of children not involved. *In re Holley*, 163.

1951. Usurious interest paid may be set up and recovered by way of counterclaim. *Riley v. Sears*, 509.

2016. Not repealed by section 2107, and husband can acquire no lien on wife's land for labor done, etc. *Kearney v. Vann*, 311.

2094. A husband can acquire no lien for work done on wife's land. *Kearney v. Vann*, 311.

2107. This does not repeal section 2016, and husband has no lien on wife's land for work done, etc. *Kearney v. Vann*, 311.

2646. Applies to logging or tramroads. *Roberson v. Lumber Co.*, 328.

2773. As to what continuances the clerk is entitled to his fee. *Luther v. R. R.*, 103.

2855. Remedy by injunction is proper to restrain enforcement by sheriffs of different counties of taxes claimed on same personal property. *Sherrod v. Dawson*, 525.

2986. Fire chief may issue permit to build, etc. *S. v. Eubanks*, 628.

3010. Fire chief may issue permits to build, etc. *S. v. Eubanks*, 628.

3292. Except as modified by sections 3500, 3506, petty larceny is within jurisdiction of Superior Court. *In re Holley*, 163.

3293. Except as modified by sections 3500, 3506, petty larceny is within jurisdiction of Superior Court. *In re Holley*, 163.

3354. Supporting evidence of prosecutrix in indictment for seduction. *S. v. Malonee*, 200.

3431. Necessary to show fraudulent intent to convict under this section. *S. v. Griffin*, 611.

3500. Value of goods stolen alleged in indictment not conclusive of jurisdiction in instances of aggravation. *In re Holley*, 163.

3506. Value of goods stolen alleged in indictment not conclusive of jurisdiction in instances of aggravation. *In re Holley*, 163.

3534. A club ordering beer from beyond the State at request of its members, the title to the beer does not vest in the club, when. *S. v. The Colonial Club*, 177.

3559. To recover punitive damages for obstructing navigable streams, it is necessary to show malice, fraud, etc. *Warren v. Lumber Co.*, 34.

REVISAL—*Continued.*

SEC.

3814. Indictment sufficient for penalty for failure to show ingredients of cotton-seed meal used by one for fertilizer, and validity of statutes permitting *qui tam* actions. *S. v. Oil Co.*, 635.

3822. Indictment sufficient for penalty for failure to show ingredients of cotton-seed meal sold for the use of fertilizer, and validity of statutes permitting *qui tam* actions. *S. v. Oil Co.*, 625.

3956. Indictment sufficient for penalty for failure to show ingredients of cotton-seed meal sold for the use of fertilizer, and validity of statutes permitting *qui tam* actions. *S. v. Oil Co.*, 625.

3956. The Legislature has the power to impose penalty prescribed by this section, and being to prevent imposition in sale of fertilizers, and of a public character, need not to be specially pleaded when there is allegation and proof of violation of section 3957, relating to cotton-seed meal. *Carson v. Bunting*, 530.

RIGHT OF WAY. See Railroads, 9, 10, 11, 12.

ROADS. See Highways.

RULE IN SHELLY'S CASE. See Estates, 10.

RULE OF CONVENIENCE. See Title, 6, 9.

RULE OF THE PRUDENT MAN. See Bankruptcy, 9; Negligence, 23, 46.

SAFE APPLIANCES. See Master and Servant, 2, 3, 4, 7, 8, 9, 27, 28, 29, 31, 32.

SAFE PLACE TO WORK. See Master and Servant, 2, 3, 4, 5, 6, 16, 31.

SALES. See Liens, 4; Mortgage, 7; Penalty Statutes, 9, 10, 11; Spirituous Liquors, 2, 3, 4, 5, 6, 7, 8.

1. *Deeds in Trust—Sale — Partnership — Principal and Agent—Dower—Fraud—Evidence—Nonsuit.*—A partnership of three duly executed, with their wives, a deed of trust to F. upon their separate lands to secure a partnership debt, which was foreclosed to pay the debt under its terms and conditions. The lands were bid in by the mortgage creditors, and by them conveyed to one of the firm for the amount of the debt, taking a deed in trust to secure the purchase price. This action is brought by the wife of one of the partners to set aside the conveyances on the ground that the other partners

SALES—*Continued.*

were her agents and acted in fraud of her rights: *Held,* (1) the plaintiff, having duly executed the mortgage to the partnership, conveyed her inchoate right of dower and the purchaser obtained a good and indefeasible title, whether she had paid a part or all of the purchase money for the land embraced in the mortgage, there being no evidence that the sale was not fairly and honestly conducted, or that the terms of the trust deed were not complied with; (2) it appearing that the plaintiff had full knowledge of the advertisement of the land for sale, with full opportunity to pay the debt or redeem beforehand and before the deed was made to the purchaser, and there being no evidence of fraud, a motion to nonsuit should have been allowed. *Wilson v. Wills,* 105.

2. *Mortgagor and Mortgagee — Contracts — Private Sale — Purchaser—Purchase Price.*—One who purchases land at a certain price, on which there was a mortgage, at a private sale from the mortgagee, who cancels his mortgage and thus gives a clear title to the land, is required to pay the price agreed upon without reference to any agreement between the mortgagor and mortgagee as to what part of the difference between the amount of the mortgage and the purchase price each was to receive; and the fact in this case, that the mortgagee, who negotiated the sale, received $200 more than his mortgage debt, has no bearing upon the matter. *Wooten v. Borden,* 370.

3. *Contracts—Breach—Goods Sold—Damages—Admissions—Burden of Proof—Delivery—"Ready and Willing."*—In an action to recover for a balance of goods sold under a contract, the answer admitted that defendant had received and paid for a part of the goods, alleging that he did so upon plaintiff's promise and assurance that the remainder would be of a certain standard quality: *Held,* to recover the contract price of the balance of goods, refused upon the allegation that they did not come up to the standard fixed by the contract, the plaintiff must show that it was ready and willing to deliver them, which was denied; and plaintiff's motion for judgment upon the admission in the answer, on the ground that the defendant could not refuse to accept the balance of the goods on account of defects in the goods already received, was properly denied. *Cotton Mills v. Hosiery Mills,* 462.

4. *Contracts — Breach — Goods Sold — Damages — Defects—Evidence.*—The defense, in an action for damages on defendant's

SALES—*Continued.*

refusal to accept certain yarns, sold under contract, being that the yarns were defective, it was competent to show by plaintiff's correspondence in this case matters relating to such defects, in corroboration of defendant's witness; and, also, in reply to plaintiff's evidence that yarns of the character refused by defendant were sent to plaintiff's other customers without complaint made. *Ibid.*

SATISFACTION. See Judgment, 2.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Schools—Races — Discrimination — Constitutional Law—Provisions Mandatory.*—The constitutional provisions for a uniform system of public schools, and that the children of the white and colored races shall be taught in separate schools without "discrimination in favor of or to the prejudice of either race," are mandatory, and may be disregarded neither by legislatures nor officials charged with the duty of administering a given law. Constitution of N. C., Art. XIV, sec. 2. *Bonitz v. School Trustees*, 375.

2. *Same.*—An act of the Legislature designating a certain boundary "as a school district for the white race," requiring by construction that the funds to be raised under its provisions shall exclusively apply to the white schools within its boundary and the additional facilities afforded shall only be enjoyed by the white children attending the schools, is unconstitutional. Constitution of N. C., Art. XIV, sec. 2. *Ibid.*

3. *Legislative Acts—Courts—Interpretation—Constitutional Law.* Courts will not adjudge an act of the Legislature invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable. *Ibid.*

4. *Same.*—Between two permissible interpretations of a statute with reference to the Constitution, the one should always be adopted which upholds the law. *Ibid.*

5. *Same—Schools—Taxation — Bond Issues—Races—Discrimination.*—When a legislative enactment clearly indicates that its controlling purpose and, in several places, its expressed intent is to establish a special taxing district for the purpose, by an increase of taxation and an issue of bonds, of affording additional school facilities within the prescribed district, the beneficent purpose of the act will not be frustrated because, in one of the sections, it is designated as a "school district for the white race." *Ibid.*

6. *Same—Application of Funds.*—Chapter 210, Laws 1909, entitled an act to incorporate a certain school district and allow

SCHOOLS AND SCHOOL DISTRICTS—*Continued.*

it to vote on a special tax for schools and to issue bonds, in the body of the act clearly defined the boundaries of the district, provided for taking a vote upon the questions of special taxation and the issuance of the bonds and for the application of the moneys derived to the building and equipping of suitable buildings, and "for such other purposes as the trustees may order"; also, that the amounts coming from the special tax shall be paid by the proper officers to the board of trustees, to be by them used "for the benefit of the public schools of the district." The questions of taxation and bonds were duly acted on and approved by the people of the district: *Held*, (1) a designation in one of the sections of the act that the district was "for the white race" should be disregarded, and the constitutionality of the act upheld; (2) upon the facts in this case there is nothing to show that the proceeds of the bond issue, or the portion involved, may not be applied as directed by the act. *Lowery v. School Committee*, 140 N. C., 33, and *Smith v. School Trustees*, 141 N. C., 143, cited and approved. *Ibid.*

SCOPE OF EMPLOYMENT. See Master and Servant, 11.

SEAL. See Corporations, 1, 2, 3, 6.

SEALED BIDS. See Contracts, 12, 13.

SEDUCTION. See Marriage and Divorce, 1, 2, 3, 4, 5, 6.

SELF-DEFENSE. See Manslaughter, 1, 2.

SENTENCE. See Interpretation of Statutes, 8; Constitutional Law, 20, 21.

SEPARATE ESTATES. See Husband and Wife, 4, 5, 6, 7.

SEWERAGE. See Lessor and Lessee, 1, 2.

SHADE TREES. See Cities and Towns, 19.

SITUS OF PROPERTY. See Corporations, 10.

SPECIAL VERDICT. See Spirituous Liquors, 4.

SPECIFIC PERFORMANCE. See Contracts, 1, 2, 3; Deeds and Conveyances, 2, 5.

SPIRITUOUS LIQUORS.

1. *Spirituous Liquors — Penalty Statutes — Construction.*— The statute prohibiting the sale of spirituous, etc., liquors is a penal one, strictly to be construed, and the meaning of the words employed of "precise legal import, both at law and in

SPIRITUOUS LIQUORS—*Continued.*

equity," will not be extended to include an unexpressed but presumed intention of the Legislature. *S. v. Colonial Club,* 177.

2. *Same—"Sale"—Intent.*—The words "sale" or "sell," used in the general prohibition law, have a well-known legal signification, and in the absence of anything to the contrary appearing in the statute, that signification is assumed to be the one intended. *Ibid.*

3. *Same—Consideration.*—In order to constitute a sale within the meaning of the general prohibition law, there must be a transfer upon a valuable consideration of the absolute or general property in the spirituous liquor alleged to have been sold contrary to law. *Ibid.*

4. *Same — Interpretation of Statutes — Gratuitous Bailee—Commingling of Goods—Principal and Agent — Special Verdict—Intent.*—Upon the trial of the defendant club for the sale of spirituous liquor contrary to the general prohibition law, it appears by special verdict that, under an existing arrangement for all members, one of its members made an order for beer in bottles on a dealer beyond the State, directing that it be shipped to him in care of the defendant, handing the steward of the club the amount of the order in money, and which the club remitted the dealer by its check on its bank account. The beer was received by the manager of the club and commingled with the bottled beer of other members, and furnished to the member according to a general system of checking used by the club, until the number of bottles ordered was gone. The club did not solicit these orders: *Held,* (1) under this arrangement the title to the beer did not vest in the club; (2) ordering the beer from beyond the State was not an illegal act, the club acting as the agent of the member and the title to the beer did not vest in the club (Revisal, sec. 3534); (3) the club rendering the service without compensation, was a gratuitous bailee, having only a qualified interest, and the fact that the bottles of beer of one member were commingled with those of the others kept by the club as such, did not render the transaction a sale; (4) the facts in this case did not constitute the club the agent of the vendor in another State; (5) as the special verdict did not find the intent, its existence may not be presumed by the court. *Ibid.*

5. *Spirituous Liquors—Sale — Evidence — Declarations—Competency—Ex Parte.*—Upon a trial for unlawfully selling whiskey, there was evidence tending to show a conversation over-

SPIRITUOUS LIQUORS—*Continued.*

heard at the time of the alleged sale by the witness, a policeman, between the defendant and one S., whom the witness had employed to buy the whiskey with a dollar marked for identification: *Held*, competent as tending to prove the guilt of the accused by his own declarations; but that it was incompetent for the defendant to show later declarations of S. as to what occurred during the conversation testified to, in corroboration of defendant's testimony that he gave S. the whiskey for his sick wife and only changed the dollar for him. *S. v. Hopkins*, 622.

6. *Spirituous Liquors—Procuring Sale—Police Officers—Evidence—"Connivance."*—In this case, the methods employed by the policeman to obtain conviction of the defendant for unlawfully selling the whiskey, *Held*, not to affect the judgment. *S. v. Smith*, 152 N. C., 798, cited and approved. *Ibid.*

7. *Spirituous Liquors—Unlawful Sale—Abettors—Evidence—Instructions.*—Upon trial for violating the general prohibition law in the sale of whiskey, a charge upon supporting evidence was held correct in substance as follows: That if the jury should be satisfied from the evidence that H. owned the whiskey and brought it in a basket to defendant's home for the purpose of selling it there, and sold a pint to one D. in defendant's presence and with his knowledge, the defendant would be guilty of aiding and abetting the sale; and that as in misdemeanors all aiders and abettors are principals, the defendant would be guilty as a principal in the unlawful sale. *S. v. Denton*, 642.

8. *Spirituous Liquors—Unlawful Sale—One Act—Abettors—Evidence Sufficient.*—One is guilty of an unlawful sale of spirituous liquor as a principal when he allows the use of his home for the latter to more secretly effect the sale there; and evidence tending to show that this was done and the price paid while at defendant's home in a room wherein he was lying on a lounge, though without evidence of his receiving a part of the price paid, is sufficient for his conviction as a principal in aiding and abetting the unlawful act. *Ibid.*

STATE GRANTS. See Evidence, 5.

STATE'S LANDS.

Parties—Interest—Oyster Beds—Vacate Grants—Attorney-General—Authorization.—One who has no interest in the lands, other than that of a citizen of the State, cannot maintain an action to vacate a grant to an oyster bed (Revisal, 1748, 1750), and under such circumstances the Attorney-General

STATE'S LANDS—*Continued.*

is the only one who may maintain the action, it being his duty alone to look out for the interests of the State in such matters; and his authorization to another to bring the action is insufficient. Cases of *quo warranto* distinguished. *Jones v. Riggs*, 281.

STATUTE OF FRAUDS. See Contracts, 4, 31, 32, 35, 40.

STATUTE OF LIMITATIONS. See Limitation of Actions.

STATUTES. See Interpretation of Statutes; Penalty Statutes.

1. *Cities and Towns—Streets—Roads—Discontinuance—Legislative Powers—Compensation.*—In the absence of constitutional restraint, the authorities of an incorporated town have power to vacate or discontinue a street or public way, but when such street has been once established they can do so only by legislative sanction expressly given or necessarily implied from powers which are so conferred, and then compensation must be made to abutting owners whose property is injured. *Moore v. Meroney*, 158.

2. *Railroads—Fellow-servant Act—Scope—Interpretation of Statutes.*—While the provisions of the Fellow-servant Act, Revisal, sec. 2646, do not extend to a railroad in process of construction before it is operated as a railroad, it does apply, when the railroads are in operation, to their employees in the course of any department of the work embraced in or incidental to the operation of the road. *Twiddy v. Lumber Co.*, 237.

3. *Same—Lumber Roads.*—The provisions of the Fellow-servant Act, Revisal, sec. 2646, apply to lumber roads that operate a railroad, and with full force and effect to all their employees in the course of their service in the operation of the railroad, or any department of it. *Ibid.*

4. *Same.*—The provisions of the Fellow-servant Act do not extend to employees of a lumber company who are not connected with the operation of a railroad of the company. *Ibid.*

5. *Counties—Boundary Line—Location—Legislative Powers.*—The location of the true boundary line between counties raises a political question, and the power is vested in the Legislature to determine a disputed line. *R. R. v. Washington*, 333.

6. *Same—Intent—Interpretation of Statutes—Contracts—Constitutional Law.*—A legislative act reciting that a boundary line

STATUTES—*Continued.*

between two counties is "indefinite and uncertain," declaring its purpose to establish the line and proceeding then to define and describe the line, clearly indicates the intent to declare and establish what it deems the true boundary line; and the line so established must be taken as the true line without question of its historical correctness; and the questions of private rights and impairments of contracts are not involved. *Ibid.*

7. *Counties—Boundary Line—Location—Legislative Powers—Courts.*—Since the institution of this action to apportion to Washington and Tyrrell counties taxes on a railroad bridge over Albemarle Sound from one county to the other, a legislative enactment declaring the line to be in the middle of the sound is held as controlling the question. *Ibid.*

8. *Evidence—Sister States—Laws—Judicial Notice.*—The courts will not take judicial notice of the statutes and laws in the different States which may have changed the common law. *Miller v. R. R.,* 441.

9. *Evidence—Sister States—Laws—Burden of Proof—Procedure.* The proof of the laws of another State must be shown in evidence by the party relying upon them, and the methods of proof and the competency of evidence is regulated by statute. Revisal, sec. 1594. *Ibid.*

10. *Cities and Towns—Streets—Condemnation—Legislature—Inherent Powers—Constitutional Law.*—While there is no constitutional provision giving the Legislature power to condemn private lands for public purposes, the Legislature has an inherent right to do so, essential to the due exercise of the powers of government and to the promotion of the public welfare; and this power is practically unlimited, though subject to judicial control, if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken. *Jeffress v. Greenville,* 490.

11. *Cities and Towns—Streets—Condemnation—Legislative Powers—Notice—Hearings—Ordinance.*—When the charter of an incorporated town expressly provides that the town authorities may at once enter upon the land and proceed with the proposed improvements, and that the filing of the petition for the purpose of compensating the landowners shall not have the effect of stopping or delaying the work, and just compensation to the owners is properly provided for, it is not necessary to the validity of condemnation proceedings con-

STATUTES—*Continued.*

ducted in pursuance of the act that the owners of the land be notified and allowed a hearing before the passage of an ordinance of the town directing the widening and improvement of the street. *Ibid.*

12. *Cities and Towns — Streets — Condemnation — Assessments— Commence Work.*—It is not required that an appraisement be made of the land condemned by an incorporated town for the use of its public street, before taking the same and commencing work thereon, when the town acts under legislative authority in condemning the street, and there is sufficient provision for compensating the owners of the land. *Ibid.*

13. *Cities and Towns—Streets—Condemnation—Public Use—Questions for Court—Necessity—Legislative Powers.*—When property is condemned for a public street, it is taking for a public use, as a matter of law; but the question as to the necessity or expediency of devoting the property to the public use is one which is exclusively within the province of the legislative department. *Ibid.*

14. *Cities and Towns — Streets — Condemnation — Shade Trees— Damnum Absque Injuria — Legislative Powers.*—When the charter of a town expressly confers authority to widen a street and to remove any and all obstructions therefrom, and also makes adequate provision for compensation to the owner of the property taken for the purpose, the town acting in good faith and in a careful exercise of the powers conferred is not liable to an abutting owner for removing shade trees from the street in front of his dwelling, for such acts are *damnum absque injuria.* *Ibid.*

STOCK. See Corporations, 1.

STREET RAILWAYS. See Railroads.

STREETS. See Highways; Cities and Towns, 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20; Injunction, 1.

SUBSTITUTION. See Insurance, 9; Usury, 6.

SUITS. See Actions.

SUPERSEDEAS. See Courts, 18.

SUPPORT OF FAMILY. See Measure of Damages, 9.

SUPREME COURT. See Courts; Habeas Corpus, 2, 3, 4, 5, 6, 7.

SURVIVORS. See Wills, 5.

TAGS. See Penalty Statutes, 11.

TAXATION. See Executors and Administrators, 4; Injunction, 7.

Same—Schools—Taxation—Bond Issues—Races—Discrimination. When a legislative enactment clearly indicates that its controlling purpose and, in several places, its expressed intent is to establish a special taxing district for the purpose, by an increase of taxation and an issue of bonds, of affording additional school facilities within the prescribed district, the beneficent purpose of the act will not be frustrated because, in one of the sections, it is designated as a "school district for the white race." *Bonitz v. School Trustees*, 375.

TAXES, EQUATION OF. See Constitutional Law, 12, 13.

TAXPAYERS. See Highways, 4.

TELEGRAPHS.

1. *Telegraphs — Office Hours — Waiver.*— A telegraph company waives its rules as to reasonable office hours by accepting a message for transmission after its office is closed for the night; and when it appears in a suit for damages for delayed delivery of a telegram that it was accepted for delivery "if there was nothing the matter at the other end of the line," and was sent and received by its agent at the point of destination, the provision as to reasonable office hours is waived there, also. *Carswell v. Telegraph Co.*, 112.

2. *Same—Delayed Delivery—Service Message—Notice to Sender —Negligence.*—When a telegram is received after office hours by a telegraph company upon condition that it will be delivered at destination "if there was nothing the matter at the other end of the line," and the defense of the company, in an action for damages for delayed delivery, is that delivery could not have been promptly made because it was received at destination after office hours and there was no one by whom to send the message to addressee, the burden is upon the defendant and it is its duty to show that it had notified the sender of the fact; and evidence is insufficient which merely tends to show that a service message was sent back, but not delivered to the sender. *Ibid.*

3. *Telegraphs—Negligence — Physician—Mental Anguish—Notice —Damages.*—A telegram sent to a physician reading, "Come at once. My wife very sick," is sufficient to notify a telegraph company that mental anguish will result to the husband from a negligent delay in its delivery; and the husband may recover damages for the delay, caused by the defendant's negligence, in not sooner having the doctor in attendance upon his sick wife. *Ibid.*

TENANTS IN COMMON. See Husband and Wife, 2.

Wills—Interpretation—Devisee and Children—Tenants in Common.—Under a devise of certain lands to testator's grandson, "to him and his children born in lawful wedlock," the grandson and his children living at the time of the testator's death acquire the fee to the lands as tenants in common in equal portions. *Lewis v. Stancil*, 326.

TENDER. See Debt, 5; Deeds and Conveyances, 22, 53; Sales, 3.

TIMBER DEEDS. See Deeds and Conveyances.

TITLE. See Deeds and Conveyances, 10; Equity, 14; Estoppel, 2, 4; Evidence, 5; Mortgage, 5, 6, 7; Trespass, 1.

1. *Lands—Title—Equitable Estoppel—Divisional Lines.*—A party claiming title to lands only by reason of an equitable estoppel of the other party to the action, arising from his alleged acts and conduct respecting a line between adjoining lands, must show that the acts and conduct relied on have misled and caused him loss or damage. *Boddie v. Bond*, 359.

2. *Same.*—A party seeking in his action to estop another by his acts and conduct from claiming certain lands must show that he has been misled and prejudiced in some way by the same; otherwise, the acts and conduct relied on would not appear to cause him loss or damage. *Ibid.*

3. *Same—Deception—Fraud—Principal and Agent—Ratification—Evidence.*—The title to the disputed land was in plaintiff, unless she is estopped by her acts respecting an agreement upon a line as incorporated in a deed made to a third party, Mrs. M., the latter of whom acted through her husband M., in its purchase. The evidence disclosed that M. and defendant agreed that a certain line should divide the *locus in quo* from the land to be conveyed by plaintiff to Mrs. M.; that the plaintiff was unaware of this agreement and took no part in it, and, further, was unaware at the time of the transaction that she owned the land now in dispute; that before she signed the deed to Mrs. M., M. told the plaintiff that he had agreed with defendant on a line between the two lots, and the agreement was referred to in the deed to his wife; that M., in his transactions with the defendant, did not act as the agent of the plaintiff or represent her: *Held*, there was no element of an equitable estoppel against plaintiff's claiming the land; (1) there was no evidence of any loss by defendant arising from the acts complained of; (2) M. and defendant attempted to change a line and not to determine upon and settle a disputed one; (3) there was not

TITLE—*Continued.*

the element of intentional deception or fraud or conduct calculated to mislead defendant to his prejudice, indicated by the evidence as to plaintiff's acts, or any evidence of ratification by plaintiff of the acts of M. The principle of equitable estoppel discussed by WALKER, J. *Ibid.*

4. *Wills—Devises—Limitations—Conditions—Surviving Children—Deeds and Conveyances—Title—Defeasance.*—Under a devise of a life estate in lands, with limitation over to L., and to "the child or children of her body," with proviso if L. "dies without leaving any children, then, and in no other case, to my lawful heirs," the fee simple vests in L., defeasible upon her dying without leaving a child, and L. cannot execute a good deed in fee simple. *Elkins v. Seigle*, 374.

5. *Timber Deeds—Right to Remove — Consideration—Payment——Title to Remaining Timber—Interpretation of Deeds.*—A timber deed provided that all timber shall be removed by the grantee within a period of five years from the date of the last payment of the purchase money, and that an extension for that purpose would be allowed upon payment of interest on the purchase price "each year in advance": *Held*, a tender of the interest not made within the time specified in the deed is insufficient, and by his failure to make the required tender the grantee lost his right to the extension of time within which to remove the timber, and his interest in the timber remaining upon the land. *Powers v. Lumber Co.*, 405.

6. *Deeds and Conveyances—Title—Common Source—Rule of Convenience.*—As a rule of convenience and not as a matter of estoppel, parties to an action involving title to land claiming it from the same person are not allowed to deny the title in the common source. *Bowen v. Perkins*, 449.

7. *Same—Superior Title—Evidence.*—When the title to the land in controversy is claimed by both parties from a common source, the older title will prevail unless there is shown a better title from the one under whom both claim, or from some other person. *Ibid.*

8. *Deeds and Conveyances—Common Source — Inconsistent Title—Evidence.*—One who enters into possession of lands under a contract to purchase creates a relationship with the owner analogous to that of tenant and landlord; and until ousted or disturbed in his possession by one having a paramount title, he will not be permitted in an action for possession by the party under whom he entered to set up a title inconsistent with his. *Ibid.*

TITLE—*Continued.*

9. *Deeds and Conveyances—Title—Common Source—Contract of Purchase—Rule of Convenience.*—When the plaintiff and defendant in an action to recover lands deduce their title from a common origin, the one by deed and mesne conveyances and the other under an executory contract of purchase, neither is allowed to deny the title in the common source, for between them the elder is the better title and must prevail unless the adverse party can show a better outstanding title which he has acquired. *Ibid.*

10. *Same — Parol Agreement — Statute of Frauds.*—The plaintiff claimed title to the lands in controversy by deed and mesne conveyances, and defendant claimed under an alleged parol contract of purchase made by his lessor with one under whom plaintiff claimed in his chain of title: *Held,* the statute of frauds was not involved, and evidence of the parol contract was admissible to show that defendant claimed title from the same source as plaintiff. *Ibid.*

11. *Lands—Title—Plaintiff's Legitimacy — Defendant's Title.*—In an action for possession of lands, wherein the plaintiff's title depended solely upon the question of her legitimacy, a finding by the jury as to defendant's title is not material, as plaintiff must depend upon the strength of her own title. *Rollins v. Wicker,* 559.

12. *Lands—Title—Legitimacy—Declarations—Court Records—Secondary Evidence.*—The plaintiff sued for possession of lands, and her title thereto depended solely upon her legitimacy. It was proper to exclude the evidence of a witness, who was a juror in a former action wherein the defendant was not a party, which was offered for the purpose of showing that therein the jury found the question of legitimacy in plaintiff's favor, there being no evidence, among other reasons, that the court record had been lost or destroyed. *Ibid.*

13. *Same.*—Only duly exemplified and authenticated copies of the records in judicial proceedings are competent to prove their contents, and parol evidence of their contents is secondary and inadmissible evidence unless the original record is lost or destroyed or cannot be produced. *Ibid.*

14. *Evidence—Legitimacy — Declarations — Ante Litem Motam—Pedigree—Independent Recollection.*—In an action for possession of land, wherein plaintiff's title depended solely upon her legitimacy, objection was made by her to the testimony of defendant's witness, who stated that he remembered the time of the marriage; that plaintiff's mother (now deceased)

TITLE—*Continued.*

came through his yard "that morning and said she had been married that day," and that plaintiff was then 2 or 3 years old. The evidence held competent, as a declaration relating to pedigree, it having been made by the mother *ante litem motam*, and being her spontaneous exclamation as to an event then uppermost in her mind, was free from any suspicion of error; besides, the mother's declaration was a circumstance which tended to fix in the witness's mind the fact that, at that time, he had knowledge of the marriage and of plaintiff's age. *Ibid.*

TORT FEASORS, JOINT. See Negligence, 14.

TORTS. See Contracts, 12; Master and Servant, 11, 12.

TRAMROADS. See Railroads, 7, 26.

TRANSCRIPT. See Appeal and Error, 2, 3.

TRESPASS. See Homestead, 4.

1. *Trespass—Possession—Superior Title.*—Though trespass is a personal and possessory action, the law adjudges the possession to be in him who has the superior title, when neither party has the actual possession at the time of the alleged unlawful entry. *Waters v. Lumber Co.*, 232.

2. *Trespass—Calls—Description—Punctuation—Established Lines—Interpretation of Deeds.*—In an action of trespass on lands, the question of defendant's unlawful entry depended, under the construction of the calls in a grant under which he claims title, upon the question whether the second call was controlled by a call to the "Morris line" according to the following description: "Beginning at a pine on W. Creek or Gum Swamp at L.'s corner (this point being admitted), running thence south 41½ degrees west 12⅗ chains; thence south 20½ degrees west 18¼ chains, along Morris's line south 16½ chains," etc. The plaintiff contends that the second call should be run with the Morris line, making a difference of 92 degrees in the two courses: *Held*, (1) the first call not mentioning the "Morris line," makes it probable, at least, that it was not to reach that line; (2) it was not intended that the second call should be "along the Morris line," as the words quoted are separated by a comma from those of the second call, and qualify the third call for course and distance, there also being evidence that the description fits a location of the "Morris line" under the third call; therefore, (3) the rule that, under certain conditions, a call

TRESPASS—*Continued.*

for an established line of an adjoining tract of land will control a conflicting call for course and distance has no application. *Ibid.*

3. *Timber Deeds—Contracts—Trees Under Size—Trespass.*—An action against the grantee in a timber deed, or his assignees, for the cutting of trees of less dimension than those specified in the deed is virtually one for trespass on the land in wrongfully cutting and removing timber therefrom. *Jenkins v. Lumber Co.*, 355.

4. *Lands—Leases—Quiet Enjoyment—Covenant—Trespasser.*—A covenant of quiet enjoyment implied from a lease of lands, etc., does not extend to acts of trespassers or wrongdoers, but only to those whose rights are superior to the lessor. *Huggins v. Waters*, 443.

TRESPASSER. See Railroads, 17.

TRIALS. See Constitutional Law, 17, 18, 19, 21.

TRIBUNALS. See Insurance, 1.

TRUST FUNDS. See Corporations, 8.

TRUSTS AND TRUSTEES. See Bankruptcy, 1; Deeds and Conveyances, 1, 2, 3, 4, 14; Homestead, 2, 3, 4; Religious Societies, 2, 3.

1. *Deeds and Conveyances—Trusts and Trustees—Parol Trust—Evidence Sufficient.*—In an action to recover lands, defendant admitted the title to be in plaintiff by virtue of his being a grantee of defendant's sons, to whom the defendant had conveyed it by deed for a good and not for a valuable consideration. To establish the defense of a parol trust thereon in defendant's favor, there was evidence tending to show an absence of consideration moving from the sons to the plaintiff; that antecedent to the plaintiff's deed there was an agreement made between the sons and the plaintiff that the latter would hold the *locus in quo* for the use and benefit of defendant during his life, and there was evidence in corroboration that plaintiff had, since his deed, leased a portion of the land from defendant and had several times thereafter attempted to lease the land from him; that the lands comprised the homestead of the defendant, and he had continuously been in possession thereof, enjoying the rents and profits: *Held,* the evidence tended to show an agreement entered into prior to the execution of the deed and as a part of it, creating the parol trust, and was sufficient to sustain a verdict for defendant. *Taylor v. Wahab*, 210.

TRUSTS AND TRUSTEES—*Continued.*

2. *Trusts and Trustees—Parol Trusts—Evidence—Instructions——Questions for Jury.*—Where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for them to say whether it is "clear, strong, cogent, and convincing." *Ibid.*

3. *Deeds and Conveyances — Husband and Wife — Purchaser — Parol Trust.*—When a husband pays the purchase money for lands and has the conveyance thereof made to his wife, the law presumes that the lands are intended for a gift, or a provision made for her by him, and such facts alone are insufficient to impress the lands with a trust in his favor. *Ricks v. Wilson*, 282.

4. *Deeds and Conveyances—Grantor — Parol Trust.*—A conveyance of lands made by a father to his son without a consideration cannot impress the lands with a parol trust in favor of the father, however full and explicit the words may have been to that effect used at the time of the delivery of the deed; for a grantor, in delivering a deed, cannot retain control of the property, and by parol create a trust thereafter to be enforced in his own favor. *Ibid.*

5. *Deeds and Conveyances — Married Women — Parol Trusts — Privy Examination—Constitutional Law.*—A conveyance by a married woman of her lands cannot be impressed with a parol trust contrary to the intent expressed in her written deed. The law requires a written instrument, with the husband's written consent, and her privy examination, for her to pass an interest of this character in her lands. *Ibid.*

6. *Deeds and Conveyances—Parol Trust—Infants—Ratification—Execution of Trust.*—Having failed to show a parol trust in her favor under a deed to lands purchased by her father, but conveyed to her mother, plaintiff seeks to establish a lost deed made by her father, mother, and brother, defendants in this action, creating the trust interest for her in the lands, the title to the lands having previously to the execution of the alleged lost deed been conveyed by the father and mother to the brother, the latter of whom, at the time of the execution of the alleged lost deed, was a minor: *Held,* (1) the title in the lands being in the brother at the time in question, it was necessary for him, upon coming of age, to have ratified his deed made in his minority, and his answer denying its execution by him was an act of repudiation; (2) the doctrine that a minor may execute a valid deed in pursuance of a trust has no application. *Ibid.*

TRUSTS AND TRUSTEES—*Continued.*

7. *Deeds and Conveyances — Parent and Child — Parol Trust — Wills—Paper-writing—Evidence.*—A husband purchased certain lands and had the deed made to his wife, who thereafter by a proper deed, with her husband, conveyed the land to their son in fee simple. The plaintiff, their daughter, sought to impress the lands with a parol trust in her favor: *Held*, the will of her deceased father and a paper-writing executed by him, purporting to show that the title to the land was put in the son only for the purpose of an equitable division, were incompetent evidence; and therefore it was irrelevant to prove that such papers had been executed and destroyed in pursuance of a conspiracy to defraud plaintiff of her rights. *Ibid.*

8. *Deeds and Conveyances — Mortgages — Assignments — Seal — Title—Trusts and Trustees.*—The grantee in a mortgage deed assigned the deed under a writing thereon as follows: "For value received the F. and M. Bank hereby bargains and sells to M., his heirs and assigns, this mortgage and all its rights, title, and interest to the property therein, together with all rights and powers contained in said mortgage, without recourse to said bank." The assignment was signed by the proper officers of the bank, and it is *Held*, (1) lacking the seal, the assignment could not operate as a conveyance by the corporation; (2) if with the corporate seal, the assignment was solely of the mortgage deed, the written instrument of conveyance, and the security it affords to the holding of the debt, and it did not convey to the assignee the legal title subject to the trusts and powers contained in the mortgage. *Morton v. Lumber Co.*, 336.

9. *Wills—Devise—Trusts and Trustees — Intent — Life Estate— Remainder—Intestacy—Presumptions—Rule in Shelly's Case.* A devise of lands in special trust that J., a grandson, be allowed the "use and enjoyment" thereof during his life, and in case he should die before attaining the age of 21 years without having living children, "then to the use and enjoyment of my living children and their heirs": *Held*, (1) a devise of the fee simple will not be presumed, Revisal, 3138; (2) J. would take a life estate, with remainder to his living children, if any, and otherwise the title would then revert to the estate of the testator; (3) the presumption is in favor of testacy, requiring no express devise to the living children of J.; (4) the rule in *Shelly's case* has no application. *Cox v. Jernigan*, 584.

UNDERTAKING. See Appeal and Error, 3.

USER. See Descent and Distribution, 6, 9.

USURY.

1. *Usury—Pleadings—Answer—Parties—Legal Representatives.*—It is usury when unlawful interest has been knowingly taken, reserved, or stipulated for on a loan of money, directly or indirectly; and one knowingly acting in violation of our usury law by taking, receiving, reserving, or charging a greater rate of interest than 6 per cent per annum, either before or after the interest may accrue, "shall forfeit the entire interest, and when a greater rate has been paid, double the amount may be recovered by the party paying the same, or his legal representatives," and such may be recovered by way of counterclaim set up in the answer. Revisal, sec. 1951. *Riley v. Sears*, 509.

2. *Usury — Contracts — Notes — Illegal Consideration.*—When a debtor has paid his creditor the amount of a loan lawfully chargeable against him, and in addition thereto has given his notes for the balance of his obligation arising from an usurious amount of interest, agreed upon in making the loan, the creditor cannot recover on the notes in a suit brought for their collection. *Ibid.*

3. *Same.*—When it appears by a written contract entered into between the parties that the debtor had borrowed an amount of money which he had obligated himself to repay at a certain rate per thousand feet of lumber to be cut from timber to be purchased by the money loaned, the payments not to be less than a certain monthly sum of money, which plan included the payment of an additional amount of money to that borrowed and the lawful rate of interest thereon; and it further appears that the debtor had repaid the amount actually borrowed, with more than the lawful interest, and had given his notes for the balance: *Held,* the notes being given for an additional amount to that of the money actually loaned, and legal interest, are based entirely on an usurious consideration, and no recovery thereon can be had. *Ibid.*

4. *Usury—Contracts—Partnership—Test.*—When money is loaned to purchase standing timber and to be repaid at a certain rate per thousand feet when the timber is sawed, not less than a fixed sum per month, there is no partnership arrangement between the borrower and the lender, so as to take the matter from the operation or purview of the law against usury. *Ibid.*

5. *Same.*—The obligation to repay a loan of money borrowed to undertake an enterprise which is not made dependent on the

USURY—*Continued.*

risks to be incurred or upon whether the venture or enterprise succeeds or fails, with a stipulation in the contract for its repayment in any event at a rate of interest exceeding that allowed by law, is usurious, and not a partnership contract. *Ibid.*

6. *Same — Substitution — Accounting.*—A partnership, T. & Co., having borrowed money to be invested in standing timber, to be repaid at a certain rate per thousand feet of lumber cut therefrom, under an agreement held to be usurious, dissolved by the retirement of T., and S., the company of the firm, formed a partnership with a third person under the name of S. & Co., which soon thereafter became incorporated. Some ninety days before the time provided for the beginning of the various payments upon the loan agreed upon under the contract of T. & Co., the corporation, with the creditor's consent, cut lumber and paid off the debt, except that created by the usurious part of the contract. The corporation and the creditor, by a written agreement, entered into an accounting together and determined upon the amount due the latter under the contract: *Held,* by the consent of all the parties the corporation was substituted as successor to the original parties and the usury affecting the original transaction was not effaced or removed; (2) the agreement under which the accounting was had was with reference to and in acknowledgment of the original contract. *Ibid.*

7. *Usury — Contracts — Fraudulent Intent — Proof.*— When the lender of money intentionally charges the borrower a greater rate of interest than the law allows, and his purpose stands clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. *Ibid.*

8. *Usury—Contracts—Estates—Loss—Parties—Privies — Receivers.*—The plea of usury is open to the parties and their privies, and may be made when by the transaction the debtor's estate is wrongfully depleted, and ordinarily by one having the legal right to protect the estate, as, in this case, a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Revisal, sec. 1222. *Ibid.*

9. *Usury—Contracts — Forfeiture — Penalty—Pleadings—Amendments.*—In an action brought to recover money alleged to be due on a contract entered into between the parties, wherein the plea of usury is set up in the answer and a recovery is sought under our statute of double the amount of the inter-

USURY—*Continued.*

est paid, the recovery sought is in the nature of a penalty; and when the facts are known or readily obtainable the law requires a definite statement in the pleading as to the time and amount, before allegations in such action are held to be sufficient, and such statement not having been made, on the facts in this case, no amendment to the pleadings should be allowed. *Ibid.*

VENDOR AND VENDEE. See Sales, 3, 4; Contracts, 39.

VERDICT. See Appeal and Error, 12.

VERDICT, SPECIAL. See Spirituous Liquors, 4.

VICE PRINCIPAL. See Master and Servant.

WAGERING POLICY. See Insurance. 8.

WAIVER. See Insurance, 4, 8.

1. *Telegraphs — Office Hours — Waiver.*—A telegraph company waives its rules as to reasonable office hours by accepting a message for transmission after its office is closed for the night; and when it appears in a suit for damages for delayed delivery of a telegram that it was accepted for delivery "if there was nothing the matter at the other end of the line," and was sent and received by its agent at the point of destination, the provision as to reasonable office hours is waived there, also. *Carswell v. Telegraph Co.*, 112.

2. *Same—Delayed Delivery—Service Message—Notice to Sender —Negligence.*—When a telegram is received after office hours by a telegraph company upon condition that it will be delivered at destination "if there was nothing the matter at the other end of the line," and the defense of the company, in an action for damages for delayed delivery, is that delivery could not have been promptly made because it was received at destination after office hours and there was no one by whom to send the message to addressee, the burden is upon the defendant and it is its duty to show that it had notified the sender of the fact; and evidence is insufficient which merely tends to show that a service message was sent back, but not delivered to the sender. *Ibid.*

3. *Practice—Jurisdiction — Demurrer — Pleadings—Waiver.*—A plea to the jurisdiction of the court over the parties and subject-matter of an action, or that the complaint does not state a cause of action, is not waived by filing an answer, as such may be made at any time, even in the Supreme Court, *ore tenus. McDonald v. MacArthur*, 122.

WAIVER—*Continued.*

4. *Witnesses—Questions—Incriminative—Waiver.*—By voluntarily answering a question on cross-examination after objection thereto by his attorney, a defendant waives his constitutional privilege not to answer questions tending to incriminate himself, both as to other and distinct crimes and those used to prove the offense with which he stands charged. *S. v. Simonds*, 197.

5. *Trials—Right of Accused—Absence—Waiver.*—In felonies less than capital and in misdemeanors the defendant has the right to be present at the trial; but this right may be voluntarily waived by him, the limitation being that in the case of felonies this waiver may not be made by his counsel unless he expressly authorizes them so to do. *S. v. Cherry*, 624.

6. *Same.*—When the defendant is tried for a felony less than a capital one, and voluntarily absents himself, and especially when he has fled the court, his conduct may be construed as a waiver, wherein his presence is not essential to a valid trial and conviction. *Ibid.*

WARNING. See Negligence, 27; Railroads, 22, 24, 25.

WARRANTY. See Deeds and Conveyances, 6, 7, 9.

WATERS AND WATER COURSES.

1. *Navigable Streams—Obstruction—Damages—Punitive Damages—Evidence.*—In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by Revisal, 3559, there was evidence sufficient tending to show, and under correct instructions from the court the jury found, that the stream in question was navigable: *Held*, to recover punitive damages, it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation. *Warren v. Lumber Co.*, 34.

2. *Navigable Streams—Obstruction—Evidence—Burden of Proof.* To maintain an indictment for obstructing a canal, it must be shown that the canal was a navigable stream. *S. v. Cedar Works*, 649.

WASTE. See Injunction, 6.

WIDOW. See Executors and Administrators, 3.

WILLS.

1. *Deeds and Conveyances — Parent and Child — Parol Trust — Wills—Paper-writing—Evidence.*—A husband purchased certain lands and had the deed made to his wife, who thereafter by a proper deed, with her husband, conveyed the land to their son in fee simple. The plaintiff, their daughter, sought to impress the lands with a parol trust in her favor: *Held,* the will of her deceased father and a paper-writing executed by him, purporting to show that the title to the land was put in the son only for the purpose of an equitable division, were incompetent evidence; and therefore it was irrelevant to prove that such papers had been executed and destroyed in pursuance of a conspiracy to defraud plaintiff of her rights. *Ricks v. Wilson,* 282.

2. *Wills—Lost or Destroyed — Probate — Continues in Force.*—A will lost or destroyed before probate remains and continues in force as a will, the difference being the degree of proof required to establish it. *Ibid.*

3. *Wills—Probate—Limitation of Actions.*—The statute of limitations does not apply to the mere taking of a probate. *Ibid.*

4. *Wills—Interpretation — Devisee and Children — Tenants in Common.*—Under a devise of certain lands to testator's grandson, "to him and his children born in lawful wedlock," the grandson and his children living at the time of the testator's death acquire the fee to the lands as tenants in common in equal portions. *Lewis v. Stancil,* 326.

5. *Wills—Devises—Conditions—Age—Survivors — Limitations — Fee Simple.*—A devise of land was to the daughters of the testator, to be divided off and set apart to each upon her attaining 21 years of age, with a proviso "that if any one or more of my daughters die before reaching that age without heir or heirs, such share or shares to be divided among my surviving daughters." A codicil to the will provided: "Should any one or more of my daughters die without bearing child or children, the portion of property left by her shall go to her surviving sisters": *Held,* the only restriction upon a daughter to make a valid fee-simple conveyance of her land devised was that she must have attained the age of 21. *Griffin v. Lane,* 372.

6. *Wills—Devises—Limitations—Conditions—Surviving Children —Deeds and Conveyances—Title—Defeasance.*—Under a devise of a life estate in lands, with limitation over to L., and to "the child or children of her body," with proviso if L. "dies without leaving any children, then, and in no other

WILLS—*Continued.*

case, to my lawful heirs," the fee simple vests in L., defeasible upon her dying without leaving a child, and L. cannot execute a good deed in fee simple. *Elkins v. Seigle*, 374.

7. *Wills—Devise—Trusts and Trustees—Intent—Life Estate—Remainder—Intestacy—Presumptions—Rule in Shelly's Case.*—A devise of lands in special trust that J., a grandson, be allowed the "use and enjoyment" thereof during his life, and in case he should die before attaining the age of 21 years without having living children, "then to the use and enjoyment of my living children and their heirs": *Held*, (1) a devise of the fee simple will not be presumed, Revisal, 3138; (2) J. would take a life estate, with remainder to his living children, if any, and otherwise the title would then revert to the estate of the testator; (3) the presumption is in favor of testacy, requiring no express devise to the living children of J.; (4) the rule in *Shelly's case* has no application. *Cox v. Jernigan*, 584.

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Witnesses—Questions—Incriminative—Waiver.—By voluntarily answering a question on cross-examination after objection thereto by his attorney, a defendant waives his constitutional privilege not to answer questions tending to incriminate himself, both as to other and distinct crimes and those used to prove the offense with which he stands charged. *S. v. Simonds*, 197.

WORDS AND PHRASES. See Habeas Corpus, 5, 6.

WORK DONE. See Husband and Wife, 4, 5, 6.

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